January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B+
L6105-3	Contracts	Jennejohn, Matthew C.	4.0	B
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-25	Legal Practice Workshop I	Izumo, Alice; Polisi, Caroline Johnston	2.0	P
L6116-1	Property	Glass, Maeve	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 86.0

Total Earned JD Program Points: 86.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	Harlan Fiske Stone	3L
2020-21	Harlan Fiske Stone	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	20.0

May 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Amanda Cabal, a member of Columbia Law's class of 2022, asked me to write this letter of recommendation in support of her application for a judicial clerkship. I happily accepted. Amanda is currently a staff attorney for the U.S. Court of Appeals for the Second Circuit. While at Columbia, I served as her instructor for two courses and witnessed her commitment to public service and her unflappable work ethic. These skills, combined with her nuanced understanding of the law, would make Amanda an excellent law clerk. I strongly recommend that you invite her to join you in chambers. In my fifteen years of supervising and educating young lawyers and law students, Amanda is one of the most diligent, thoughtful, and hard-working students I have encountered. As a former law clerk and former assistant federal defender, I am confident that Amanda would be able to successfully perform the duties of a clerk.

I first met Amanda in the fall of 2020 when she enrolled in my course, *Abolition: A Social Justice Practicum*. I had the pleasure of working with Amanda for a second semester when she joined my class, *Capital Post-Conviction Defense Practicum* in the spring of 2021. Both classes combined in-class instruction with outward facing fieldwork on behalf of incarcerated clients and on social justice campaigns. Amanda's contributions during seminar and to the fieldwork revealed were exemplary. Amanda chose to devote both semesters to working on behalf of a death sentenced individual in Mississippi pursuing federal habeas corpus relief. Her areas of focus were navigating the petitioner's potential *Brady v. Maryland* claim and helping to show that the petitioner fit the diagnostic criteria for intellectual disability under *Atkins v. Virginia*. The assignments required Amanda to digest a complicated post-conviction record, understand the relevant legal standards, and navigate procedural default. Amanda's contributions to the client's case were impressive. Her eagerness to tackle difficult research areas and her ability to incorporate feedback made her a valued member of the advocacy team.

In class, Amanda regularly provided welcome insights into the social, political, and historical forces that shape the criminal legal system in this country. A native of upstate New York, Amanda had a deep understanding of the centrality of the carceral system in rural communities to provide jobs, private contracts, and sustain the local economy. Her perspective helped her classmates understand that to move toward carceral abolition, states must provide jobs and resources to rural communities that otherwise rely on prisons for economic survival. On other topics, Amanda was unafraid to share her analysis of difficult legal concepts and to explore related policy considerations.

Amanda's commitment to public service extended outside the classroom to various social justice initiatives in the local community. As president of the Prison Healthcare Initiative, Amanda helped lead law student efforts to assist incarcerated people curtail the spread of coronavirus. Amanda also served as a leader in Columbia's Paralegal Pathways Project, which helps formerly incarcerated people train for and land paralegal jobs in local legal organizations. In addition to training incarcerated people on best legal research practices, Amanda recruited local organizations to partner with the Project and helped to destigmatize incarceration in the workplace.

Equally as important, Amanda is funny, engaging, and curious. Outside of class, Amanda and I often spoke about her experiences in law school, her intentions after graduation, and the difficulty she experienced creating robust public service opportunities for herself and her classmates in a corporate-dominated learning environment. We spoke candidly about the unique pressures and demands of advocating for people from under-resourced communities. Amanda approached these discussions with experience, thoughtfulness, and care. I have enjoyed remaining in contact with Amanda since she graduated, and I left Columbia to join the faculty at Brooklyn Law. As a staff attorney for the U.S. Court of Appeals for the Second Circuit, Amanda has further honed her research and writing skills in a variety of contexts, which will be an invaluable asset to your chambers,

Amanda Cabal is exactly the kind of student who would bring the full richness of her perspective and experiences to the table. She has a sharp legal mind and a kind heart; she would make a fantastic law clerk. I give her my strongest recommendation. Please contact me, alexis.hoag@brooklaw.edu or (203) 645-4918, should you have any questions or need additional information.

Warm regards,

Alexis Hoag-Fordjour

Columbia
Law School

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility

435 West 116th Street
New York, NY 10027
T 212 854 3250 F 212 854 3554
pgenty@law.columbia.edu

May 2023

Re: Amanda Cabal

Dear Judge:

I am writing to recommend Amanda Cabal, a 2022 graduate, for a judicial clerkship. Based on my work with Ms. Cabal throughout her time at Columbia, I do so with enthusiasm.

I first worked with Ms. Cabal in my Fall 2019 Civil Procedure course. She was fully engaged and well-prepared throughout the semester. One class, in particular, stands out in my memory. I had "cold-called" her on *Singletary v. Pennsylvania Department of Corrections*[1], a case involving the application of Federal Rule of Civil Procedure 15(c)(1)(C). Ms. Cabal recounted the sad facts of the case – the prison suicide of the plaintiff's son, and the court's conclusion that she was not permitted to amend her complaint to add as a defendant the member of the prison's psychological services staff who had been working with her son before he took his life. Ms. Cabal, in analyzing the court's reasoning, drew on her background as someone who had grown up in a part of New York State with a concentration of prisons. She knew many people who were employed by these facilities, and she was therefore able to reflect on the perspectives of both the plaintiff and the correctional employee the plaintiff was seeking to hold responsible for the suicide. Ms. Cabal's analysis was sensitive and nuanced, and it brought both the tragedy and the complexity of the case to life for her fellow students. For me, this was one of the highlights of the semester.

Because of my strongly positive impressions of Ms. Cabal, I was thrilled when she chose to become involved, in her second year, with a prison reentry project I oversee with two of my faculty colleagues. The project, the Paralegal Pathways Initiative (PPI), has created a paralegal course targeted at formerly incarcerated individuals with prior experience as "jailhouse lawyers." This project has focused on the recognition that during their incarceration, many women and men have been leaders within prison communities and have taken prominent roles in programs on parenting, education, and business skills. A challenge for these individuals after release is to have their assets recognized and to be able to utilize these to achieve success. We see PPI as one way to address this.

[1] 266 F.3d 186 (3d Cir. 2001)

In the Fall 2020 semester, Ms. Cabal and the other students were registered with me for Supervised Experiential Study, which involved periodic (Zoom) meetings to discuss the students' work on various components of the project. From the beginning of the semester, Ms. Cabal showed impressive initiative. She felt that a weakness in our communication and information storage was that we were relying too much on e-mail. She set up an alternative system, trained all of us, and coordinated our efforts to implement the use of the system for all of our internal communications. It is noteworthy that none of this work was part of our original plan for the semester. She simply saw a need and filled it. She also worked on outreach to firms and other legal employers to lay the groundwork for creating professional opportunities through the use of fellowships for people who had completed the paralegal program.

In Spring 2021, the students enrolled in my seminar, "Workshop on Meaningful Reentry." In the Workshop we ran a second cycle of an experimental version of the semester-long evening paralegal course (also on Zoom). For this pilot we had recruited 12 formerly incarcerated "co-designers," chosen on the basis of their personal and professional backgrounds. The co-designers played a dual role: they experienced the course as full participants, completing all of the in-class exercises and homework assignments and engaging in the classroom discussions; and they acted as our partners by offering their honest critiques of the course's effectiveness and making valuable suggestions for improving it. The law students had responsibility for helping to develop and refine the curriculum, recruiting and supporting facilitators, participating in interactive class exercises with the co-designers (often in "breakout rooms"), setting the agenda for our post-class debriefing meetings, and compiling our collective reflections after each week's meeting.

Ms. Cabal participated fully in all of the class activities and took a leading role in organizing or running many of the debriefing sessions. But she again saw unmet needs, and she moved to address these. She made the connections necessary to procure materials from the Law School for the co-designers that would enhance their participation in the course. And she also came up with the idea of giving the co-designers the opportunity to have professional quality photographs made to help them with their job searches. She found a photographer who was willing to provide *pro bono* services, and she handled all of the scheduling arrangements. Again, no one had thought of any of this; she came up with the idea and took responsibility for implementing it successfully.

Ms. Cabal continued in a leadership position in the program in her third year as Fellowship Co-Chair. In that role she oversaw our first round of fellowships for program participants, which were awarded at the end of the Spring 2022 semester of the paralegal course. This involved intensive work coordinating with potential partners on the details and requirements of these fellowships and designing information sessions and an application process for the participants.

I had one additional opportunity to work with Ms. Cabal. In her second year she asked me to serve as her academic advisor for the chapter she was writing for the *Jailhouse Lawyer's Manual* of our Human Rights Law Review. The chapter focused on the grievance procedures in Florida state prisons. There was a previous version of this chapter, but it was badly out of date, so Ms. Cabal had to research and rework the chapter completely. She also had to develop a complete mastery of the subject matter in order to explain the concepts in a way that would be practically useful to a lay audience (incarcerated individuals and their families) with no legal education.

Ms. Cabal did excellent work on this project. Her chapter was easily readable and comprehensive. The writing was polished with good attention to detail. She also showed an ability to accept constructive feedback and incorporate it into her work. In addition, in several places she developed charts to summarize the text visually. This was an effective way to communicate information to readers with different learning styles.

Ms. Cabal's accomplishments at Columbia went beyond her work with me. She was designated a Harlan Fiske Stone Scholar for overall academic performance. In addition, her writing, research, and organizational abilities earned her selection as Executive Articles Editor for the Human Rights Law Review.

Ms. Cabal has also shown an inspiring dedication to public interest work, with a particular focus on prison-related issues. Prior to law school, she was a research analyst with the Rochester Decarceration Initiative. In her first law school summer, she interned with Prisoners' Legal Services of New York, and during both semesters of her second year she had an externship in which she researched procedural issues relating to habeas corpus in capital cases. In her second summer she interned with the Legal Aid Society Prisoners' Rights Project. She also served as a research assistant for PPI under the supervision of my colleague Susan Sturm. In that role she launched a project – which was primarily her own idea – in which our PPI co-designers were compensated for providing feedback on chapters of the *Jailhouse Lawyer's Manual*. They offered suggestions about the substance and the readability and overall effectiveness of the chapters. This was a wonderfully successful and mutually beneficial collaborative undertaking.

Ms. Cabal was recognized by Columbia for this exceptional commitment to public interest work. She was awarded one of our prestigious Lowenstein Fellowships, which provides enhanced loan repayment assistance for students pursuing public interest careers.

As you know, Ms. Cabal is currently serving as a Staff Attorney with the Court of Appeals in the Second Circuit. She prepares bench memoranda and provides legal analysis and recommended dispositions for the judges in both counseled and *pro se* cases. She has found this experience immensely rewarding and is eager to build upon it with a judicial clerkship.

I am confident that Ms. Cabal would make important contributions to your work. She is smart, resourceful, and highly motivated. She has excellent writing, research, and organizational skills. And on a personal level, she has a refreshing modesty and lack of pretense. She is decidedly not a self-promoter; she simply takes initiative, performs her work, and does it successfully.

For all of these reasons, I am delighted to recommend Ms. Cabal to you. Please contact me if you need additional information.

Sincerely yours,

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor in
Professional Responsibility
212-854-3250
pgenty@law.columbia.edu

May 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Amanda Cabal for position as your law clerk. I worked closely with Amanda during her second and third year at Columbia Law School through her role in the Paralegal Pathways Project (PPI) and the Jailhouse Lawyers Manual. As the Principal Investigator on grants relating to the fellowship, recruitment, and sustainability of PPI and a faculty supervisor for the Jailhouse Lawyers Manual, I had the opportunity to experience firsthand Amanda's extraordinary day-to-day work. Her commitment, effectiveness, insight, wisdom, analytical rigor, and follow through were exemplary. She was a consistent, grounding, and powerful presence in the work, combining comprehensive research, excellent writing, and commitment to building the leadership of people directly affected by mass incarceration. Her daily actions spoke volumes about the centrality of justice to Amanda's sense of self, her professional identity, and her daily practice. She used her time in law school to build her capacity as a legal advocate and a change agent equipped to collaborate with and advocate for system-impacted individuals and communities. She has carefully crafted a professional trajectory that will continue to position her to be an effective lawyer, leader, and collaborator. She is an outstanding and exemplary candidate for a clerkship. I recommend her with great enthusiasm and without reservation.

Amanda served as PPI's Fellowship Coordinator and Summer Research Assistant during her second summer, creating an innovative and lasting collaboration between PPI and the Jailhouse Lawyers' Manual. Her thorough and beautifully presented research on barriers to employment stemming from incarceration became a pillar of PPI's successful application for the Clifford Chance Racial Justice Award, and then a part of PPI's curriculum. Without fanfare or self-promotion, Amanda just consistently did the work that needed to be done, often going way beyond the call of duty to help create a truly path-breaking collaboration among law students and people directly affected by incarceration. Her work modeled the value of incorporating directly affected individuals into advocacy, research, and policy making, and also supported those individuals to increase their success and thrive in these roles. This focus is both innovative and necessary to advance transformative change in the criminal legal system.

Amanda also demonstrated strong leadership abilities as Fellowship Coordinator for PPI. She enlisted a group of students in developing the fellowship component of PPI, participated in fund-raising, built collective interest in supporting the work going forward, and laid the foundation for strong leadership to emerge so that the work would be sustained going forward. Her commitment to public interest is unwavering and profound, leading to her receipt of the Lowenstein Fellowship, a highly competitive award for students pursuing public interest. As I said in my recommendation, "Amanda is the real deal. I cannot imagine a more deserving recipient of the Enhanced LRAP scholarship."

Amanda's position as the Staff Attorney for the U.S. Court of Appeals of the Second Circuit has further strengthened her already outstanding research and writing skills and crystallized her interest in clerking. That position has drawn on her analytical and communication skills, affording her the experience of writing bench memoranda and orders, providing legal analysis and proposed dispositions in both counseled and pro se cases, most often reviewing pro se filings. I have been impressed with the insightfulness, care, and balance apparent in her reflections about her experience in the prisoner's rights and criminal appeals space.

Amanda is an unusually committed, thoughtful, and responsible lawyer, one of the most effective I have worked with at Columbia Law School. She also has a dry and wonderful sense of humor, and a calm presence that makes her a joy to work with. I have no doubt that Amanda will be an outstanding law clerk, and give her my unqualified recommendation. Please feel free to follow up if I can provide any additional information.

Sincerely,

Susan Sturm

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

AMANDA CABAL
Columbia Law School J.D. '22
(315) 515-7018
apc2167@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is a bench memo providing legal analysis and a recommended disposition in a *pro se* appeal for a three-judge panel of the Second Circuit. Names of the parties have been changed along with any other identifying information. This writing sample has been lightly edited for grammar and is being used with permission from my supervisor at the Staff Attorney's Office.

Issue Raised and Recommendation

Issue: John Doe, proceeding *pro se*, appeals from a judgment dismissing his claims brought under 42 U.S.C. § 1983 and related state laws for, among other things, malicious prosecution. Pursuant to a warrant, Doe was arrested for violating the conditions of an order of protection after mail addressed to him arrived at his ex-wife's home—the apparent result of providing his former address when filling out a rental-car application. After the prosecutor entered a *nolle prosequi*, Doe sued the Franklin Police Department, the complaining witness, other individuals named in the order of protection, and the responding Franklin Police Department employee, Officer Smith. On a motion from the defendants, the district court dismissed the complaint, finding that, as relevant here, Doe failed to establish there was not probable cause for his arrest and subsequent prosecution. Doe now appeals only the dismissal of his state and federal malicious prosecution claims as to the complaining witness and Officer Smith. Additionally, Doe appeals the district court's failure to grant him leave to amend his complaint.

Recommendation: Affirm the judgment of the district court. Probable cause is a complete defense to malicious prosecution claims and Doe did not overcome the presumption that a judicial arrest warrant is supported by probable cause. The district court did not abuse its discretion when it failed to grant Doe leave to amend as Doe has not identified how amendment would cure the deficiencies in his complaint.

Background

In 2011, Jane Miller, a defendant in this case, obtained an order of protection against Doe. Record on Appeal ("ROA") doc. 1 (Compl.) ¶ 1. Doe was later accused of violating this order and eventually entered an *Alford* plea, which resulted in a 50-year extension of the order of protection, now set to expire in 2062. *Id.* ¶ 2. In 2017, the Order of Protection was modified to include Mark

Miller and Mary Miller, relatives of Jane Miller, as protected persons. *Id.* ¶ 21. As relevant here, the order of protection directed Doe to "not contact the protected person in any manner, including by written, electronic or telephone contact" and to "not contact the protected person's home, workplace, or others with whom the contact would be likely to cause annoyance or alarm to the protected person." *Id.* ¶ 34.

In 2016, Miller reported to the Franklin Police Department that she was receiving mail at her address, 10 Elm Street—where Doe had lived previously—that was addressed to Doe. *Id.* ¶ 20. The mail, "2 or 3" envelopes, were invoices from a rental car company including toll and parking violation receipts. *Id.*

Police Officer Smith called the rental car company. A representative told her that the address could have been obtained from old rental information, but agreed to send Officer Smith a copy of the rental agreement to determine if Doe provided Miller's address, thereby violating the order. ROA doc. 2 at 24. According to Officer Smith, the rental agreement, signed by Doe in November 2016, indicates 10 Elm Street as the address and includes his signature. *Id.* at 25, 26. Based on this information, in February 2017, Officer Smith submitted an arrest warrant application which was signed by a Connecticut state court judge, who found probable cause that Doe had violated the order of protection. Doe was arrested at the Canadian border in New York on July 4, 2017 and was held pending transport to Franklin. *Id.* at 23. Doe was released on bond on July 20, 2017 and defended the charges until the prosecutor entered a *nolle prosequi* in October 2018, approximately 18 months after Doe's arrest.

I. Proceedings in the District Court

In October 2021, Doe filed his complaint in the Northern District of New York. Doe named the Franklin Police Department, and Police Officer Smith (the "City" defendants), as well as the individuals named in the order of protection: Jane Miller, Mark Miller, Mary Miller (the "Miller"

defendants). On a motion from the City defendants, the case was transferred to the Connecticut District Court. Doe alleged malicious prosecution, false arrest, negligence, gross negligence, and intentional infliction of emotional distress under 42 U.S.C. § 1983. Doe also alleged state law claims for negligence, gross negligence, malicious prosecution, false arrest, false imprisonment, negligent infliction of physical pain and emotional distress, intentional infliction of physical pain and emotional distress, and defamation. Finally, Doe sought either declaratory or injunctive relief that would nullify the *Alford* plea or find the Order of Protection null and void. Both the Franklin and the Miller Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).

The district court granted their motion, reasoning as follows.

a. Franklin Police Department

Because the Franklin police department is not a municipality, it is not capable of being sued under § 1983 or Connecticut state law. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 690; *Luysterborghs v. Pension and Retirement Bd. of City of Milford*, 50 Conn. Supp. 351, 354 (2007) ("The General Statutes do not contain a provision that generally establishes all municipal departments, boards, authorities and commissions as legal entities that operate separately from the municipality itself."). ROA doc. 60 (Order) at 5. Accordingly, all claims against the Franklin Police Department were dismissed with prejudice. *Id*. at 6.

b. Officer Smith

i. Malicious Prosecution, False Arrest, and False Imprisonment Claims

Officer Smith had probable cause to arrest Doe, and therefore Doe could not plead a plausible claim for malicious prosecution, false arrest, or false imprisonment. Probable cause is presumed as a matter of law when an arrest is made pursuant to a warrant issued by a neutral magistrate and Doe did not plausibly allege that Officer Smith prosecuted or arrested him without

probable cause because he did not identify any false statements in Smith's affidavit. ROA doc. 60 (Order) at 11–13.

ii. Remaining § 1983 Claims

Doe brought other claims pursuant to § 1983: "Negligence and Gross Negligence," "Physical Pain and Suffering" and "Intentional Infliction of Ongoing Emotional Distress" under the Fourth Amendment. The district court found that "[n]one of these claims are cognizable under the cited authority." *Id.* at 14. All § 1983 claims against Officer Smith were dismissed with prejudice.

iii. State Law Claims

Doe's state law causes of action failed to state a claim, were time barred, and, as to the negligence and negligent infliction of emotional distress causes of action, were precluded by governmental immunity. *Id.* at 14. All state law claims against Officer Smith were dismissed with prejudice. *Id*. at 14–15.

c. Miller Defendants

i. § 1983 Claims

Jane Miller is Doe's former spouse and the other named defendants are her relatives. Doe did not allege that any of the Miller defendants were government officials or that any of their conduct was "fairly attributable" to the state. *Id.* at 7. Therefore, the Miller defendants could not be held liable under § 1983 and the federal claims against them were dismissed with prejudice. *Id.*

ii. State Law Claims

Doe raised various state law claims outlined above. The district court found that they all failed as a matter of law for factual insufficiency. *Id.* However, it also determined that they each failed on the merits, reasoning as follows:

"Negligent infliction of physical pain" and "intentional infliction of physical pain" are not recognized causes of action under Connecticut law. *Id.* at 9. The negligence claim could not be sustained because a person protected by a protective order has no legal duty to the person against whom the protective order is issued to refrain from opening or reporting mail sent to her residence, s*ee Pelletier v. Sordoni/Shanska Const. Co.*, 286 Conn. 563, 578 (2008). ROA doc. 60 (Order) at 8. The false arrest claim failed because Doe was arrested pursuant to a warrant supported by probable cause, *see Lo Sacco v. Young*, 20 Conn. App. 6, 20 (1989). ROA doc. 60 (Order) at 8. The negligent infliction of emotional distress claim failed because a person protected by a restraining order who receives mail and then reports that mail is not engaged in behavior that would have an unreasonable risk of causing emotional distress, *see Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 446–47 (2003). ROA doc. 60 (Order) at 8. Finally, the conduct Doe alleged was not sufficiently outrageous as a matter of law to support an intentional infliction of emotional distress claim, *see Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 210–11 (2000) (discussing what constitutes outrageous conduct as a matter of law). ROA doc. 60 (Order) at 9.

The district court also denied Doe leave to amend his state law claims because his causes of action were time barred and therefore futile. *Id.* Doe was arrested on July 4, 2017, but did not file his complaint until October 20, 2020. The court determined that the arrest was both the occurrence at issue and the time at which Doe discovered some form of actionable harm. In Connecticut, negligence, gross negligence, and negligent infliction of emotional distress carry a two-year statute of limitations and three-year statute of repose. Conn. Gen. Stat. § 52-584. ROA doc. 60 (Order) at 9. Malicious prosecution, false arrest, false imprisonment, and intentional infliction of emotional distress and economic damages are subject to a three-year statute of

limitations. Conn. Gen. Stat. § 52-577; ROA doc. 60 (Order) at 10. The court found that all of Doe's state law claims were therefore time barred and amendment would be futile.

II. Proceedings in this Court

Doe explicitly appeals only the dismissal of his § 1983 and state law malicious prosecution claims against Jane Miller and Officer Smith. 2d Cir. doc. 34 (Brief) at 1. Doe argues there was no probable cause to arrest and prosecute him, and that information in the affidavit supporting the arrest warrant is false. Additionally, Doe argues that his state law claim was timely brought and that the district court should have granted him leave to amend so that he might sufficiently plead facts. *Id.* at 6.

The defendants both urge this Court to affirm the district court's judgment. Officer Smith argues that because Doe's arrest was made pursuant to a valid judicial warrant, Doe cannot establish probable cause. 2d Cir. doc. 46 (Brief) at 6. Miller argues that she is a private citizen and therefore Doe's federal and state law claims cannot be sustained against her. 2d Cir. doc. 49 (Brief) at 10.

Discussion

This Court "review[s] the grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013). A complaint "must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. Malicious Prosecution

Under Connecticut law, a malicious prosecution claim requires proof that "(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without

probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." *Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2d Cir. 2017) (quoting *Brooks v. Sweeney*, 299 Conn. 196, 210–11 (2010)). Similarly, under § 1983, the elements of an action for malicious prosecution are "(1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003).

Under both Connecticut and federal law, probable cause is a complete defense to malicious prosecution. *See Mara v. Rilling*, 921 F.3d 48, 73 (2d Cir. 2019) (citing *McHale v. W.B.S. Corp.*, 187 Conn. 444, 447 (1982)). The relevant probable cause analysis "looks to the law of the state where the arrest and prosecution occurred." *Washington v. Napolitano*, 29 F.4th 93, 104 (2d Cir. 2022), *cert. denied*, No. 22-80, 2022 WL 17408172 (Dec. 5, 2022). The federal and Connecticut standards are substantively identical, requiring that "officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* at 104–05.

"[I]t is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness." *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) (internal quotation marks omitted). And an arrest authorized by a judicial warrant is generally "presumed" to be supported by probable cause. *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (such warrants "may issue only upon a showing of probable cause"). To establish otherwise, a plaintiff must show (1) that supporting warrant affidavits "on their face, fail to demonstrate probable cause"; or (2) that defendants misled

a judicial officer into finding probable cause by knowingly or recklessly including material misstatements in, or omitting material information from, the warrant affidavits. *Id.* at 156.

The district court correctly dismissed the malicious prosecution claims against the defendants because Doe's arrest was made pursuant to a warrant issued by a neutral magistrate and Doe has failed to show that this warrant was supported by false or misleading information. Doe was arrested for violating a protective order that ordered him not to "contact the protected person in any manner, including by written, electronic or telephone contact and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." ROA doc. 1 (Compl.) at 34. Doe argues that the letters sent to Miller's home were sent automatically and that he did not, by definition, "contact" Miller, as a third party, the rental car company, actually sent the letters. 2d Cir. doc. 34 at 7.

However, an officer's assessment of whether an offense has been committed need not "be perfect" because "the Fourth Amendment allows for some mistakes on the part of government officials," including "reasonable . . . mistakes of law." *Heien v. North Carolina*, 575 U.S. 54, 60–61 (2014). Therefore, even if Officer Smith mistakenly believed that the letters sent to Miller's home qualified as "contact," for the purpose of Conn. Gen. Stat. § 53a-40e, this mistake was likely reasonable, and therefore non-actionable. *See United States v. Coleman,* 18 F.4th 131, 140 n.4 (4th Cir. 2021) ("Under *Heien*, an officer's mistake of law may be reasonable if the law is ambiguous, such that reasonable minds could differ on the interpretation, or if it has never been previously construed by the relevant courts"); *United States v. Diaz*, 854 F.3d 197, 204 (2d Cir. 2017) (officer's "assessment was premised on a reasonable interpretation of an ambiguous state law, the scope of which had not yet been clarified" and other New York courts had reached conflicting conclusions).

While it is unclear whether Doe actually violated the protective order, the record shows that Officer Smith sought information to ensure to some extent that the contacts were initiated by Doe and not the byproduct of old information. In the application for the arrest warrant, Officer Smith states that she spoke to a car rental representative who said that Doe provided Miller's address. ROA doc. 1 at 20. Further, in the original incident report, Officer Smith writes that the address "could have been obtained from old rental information" but that she would obtain a copy of the rental agreement to determine if Doe provided the address. ROA doc. 1 at 24. Given the arguably broad wording of the protective order, and the fact that Officer Smith explicitly sought information to confirm that Doe had affirmatively provided Miller's address, Doe's allegations do not overcome the presumption that probable cause supported the judicial warrant.

While the probable cause justification for Doe's prosecution is arguably thin, Doe still has not pled that Miller or Officer Smith acted with malice, a required element of a malicious prosecution claim under federal and Connecticut law. *See Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2d Cir. 2017) (quoting *Brooks v. Sweeney*, 9 A.3d 347, 357 (Conn. 2010)); *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003). Doe's argument, that the defendants acted with malice, is based exclusively on allegations that they lacked probable cause to arrest him. 2d. Cir. doc. 34 (Brief) at 15. Malice may be inferred from a lack of probable cause, *Rentas v. Ruffin*, 816 F.3d 214, 221 (2d Cir. 2016), however, as discussed above, Doe has not overcome the presumption that probable cause existed for his prosecution based on the judicial warrant.

Additionally, Miller is a private citizen. To prevail under § 1983, a plaintiff must demonstrate that a defendant acting under the color of state law deprived them of their rights. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Miller was not acting under color of state law. Further, Doe's complaint does not allege facts showing "(1) an agreement between a

state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002). Under Connecticut law, an action for malicious prosecution against a private person requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice. *McHale v. W. B. S. Corp.*, 187 Conn. 444, 447 (1982). As discussed above, there is little indication that Officer Smith, much less Miller, the complaining witness, acted without probable cause, or with malice. The district court correctly dismissed Doe's federal and state malicious prosecution claims against both of these defendants.

II. Leave to Amend

This court reviews *de novo* a district court's denial of leave to amend based on futility. *Olson v. Major League Baseball*, 29 F.4th 59, 71–72 (2d Cir. 2022). Amendment is futile if the proposed amended complaint fails to cure prior deficiencies or to state a claim upon which relief can be granted. *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

On Doe's state law claims, the district court found that leave to amend would be futile because they were time barred. *See* Conn. Gen. Stat. § 52-577 ("No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."). ROA doc. 60 (Order) at 9. Doe was arrested on July 4, 2017, the *nolle prosequi* was entered in his favor in October 2018, and he brought this claim in October 2021.[1] The district court determined that

[1] The time bar does not apply to Doe's § 1983 claims. A three-year statute of limitations period applies to Doe's § 1983 claims. *See Lounsbury v. Jeffries*, 25 F.3d 131, 132 (2d Cir. 1994) (stating that § 1983 actions arising in Connecticut are governed by the three-year period set forth

Doe's state law cause of action for malicious prosecution arose, at the latest, on the date of his arrest. ROA doc. 60 (Order) at 10. In support of this accrual date, the court cited an unreported case, *Gojcaj v. City of Danbury*, U.S. Dist. LEXIS 696, at *6 (D. Conn. 2016), for the proposition that "Connecticut state law causes of action for malicious prosecution begin to run at the outset of the prosecution." ROA doc. 60 (Order) at 10.

Under § 52-577, the applicable statute of limitations period commences upon the "act or omission complained of." *See Evanston Ins. Co. v. William Kramer & Assocs., LLC*, 890 F.3d 40, 45 (2d Cir. 2018). Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "Section 52-577 is a statute of repose that sets a fixed limit after which the tortfeasor will not be held liable. . . [S]ection 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." *Pagan v. Gonzalez*, 113 Conn. App. 135, 139 (2009) (quoting *Labow v. Rubin*, 95 Conn. App. 545, 467–68 (2006)). "When conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." *Id.*

Despite the district court's citation to *Gojcaj*, review of the case law reveals that there is mixed treatment of the accrual date under Connecticut common law: *Silano,* No. CV-18-6076642

in Connecticut General Statute § 52-577). However, § 1983 and state law claims differ as to the date on which the statute of limitations begins to run. For § 1983 claims, federal law, not state law, determines the accrual date of a claim. *See Wallace v. Kato*, 549 U.S. 384, 388, 2d 973 (2007). A malicious prosecution claim accrues when "criminal proceedings have terminated in the plaintiff's favor." *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). Doe's criminal proceedings terminated in his favor in October 2018, when the prosecutor entered a *nolle prosequi.* The latest Doe could have brought his claim was October 2021. Doe filed in the district court in October 2021 and his § 1983 claims are therefore timely.

S, LEXIS 825, at *9 (Super. Ct. Jan. 9, 2020) (rejecting a common law malicious prosecution claim under § 52-577 when it was filed three years from the favorable disposition of the underlying criminal action); *Washington v. Ivancic*, 113 Conn. App. 131, 134 (2009) (holding that, based on *Lopes v. Farmer*, 286 Conn. 384 (2008), the statute of limitations in a § 52-577 malicious prosecution claim commences to toll from the date the criminal matter is dismissed.); *Turner v. Boyle*, 116 F. Supp. 3d 58, 91 (D. Conn. 2015) (a state law claim for malicious prosecution "accrues only after the underlying action terminates in the plaintiff's favor"). While various courts cite *Lopes v. Farmer*, 286 Conn. 384 (2008), *Lopes* dealt only with a § 1983 malicious prosecution claim. It is unclear when a Connecticut common law claim for malicious prosecution begins to run.

However, because the district court decided this case on the merits, and Doe has not identified any amendments that would cure his pleading deficiencies, amendment would be futile. In his brief before this Court, Doe merely restates the pro se amendment standard. ROA doc. 34 (Brief) at 6. Doe also alleges, in a separate section, for the first time, that there were false statements about his prior arrest record in Officer Smith's affidavit for the arrest warrant. *Id.* at 9–10. As discussed previously, Doe has not overcome the presumption that probable cause for his arrest existed. The application for the arrest warrant indicates that mail addressed to himself was sent to Miller's home, in violation of the order of protection. It is unclear, and Doe has not identified, how these new allegations about his criminal record would cure his complaint. While this Court has held that district courts should generally not dismiss a pro se complaint without granting the plaintiff leave to amend, leave to amend is not necessary when it would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (finding leave to replead would be futile where the complaint, even when read liberally, did not "suggest[] that the plaintiff has a claim that

she has inadequately or inartfully pleaded and that she should therefore be given a chance to reframe"). Because Doe has not offered any new factual allegations or legal theories that would cure the existing complaint's deficiencies, the district court's denial of leave to amend was correct.

Conclusion

For the above reasons, it is recommended that this Court affirm the judgment of the district court.

Applicant Details

First Name	**Jacob**
Middle Initial	**W**
Last Name	**Ciafone**
Citizenship Status	**U. S. Citizen**
Email Address	**jwc2172@columbia.edu**
Address	**Address** Street **240 E 27th St. Apt. 2B** City **New York** State/Territory **New York** Zip **10016** Country **United States**
Contact Phone Number	**3039951285**

Applicant Education

BA/BS From	**Boston College**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Native American Law Students Moot Court (participant)** **Foundations Moot Court (editor)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Liebman, James S.
jliebman@law.columbia.edu
212-854-3423
Gerrard, Michael
michael.gerrard@law.columbia.edu
212-854-3287
Andrias, Kate
kandrias@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JACOB W. CIAFONE
420 E 27th St.
New York, NY 10016
(303) 995-1285
jwc2172@columbia.edu

June 7, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am 2023 graduate of Columbia Law School and an incoming litigation associate at Sullivan & Cromwell. During my time at Columbia, I served as a managing editor on the *Columbia Law Review*, and was a James Kent and Harlan Fisk Stone Scholar. I write to apply for a clerkship in your chambers beginning in 2025 or any year thereafter.

Ever since participating in 1L moot court, I knew that I wanted to pursue a career in litigation. I have made progress towards that goal as an intern at the United Sates Attorney's Office for the District of Colorado, and as a summer associate at Sullivan & Cromwell. My experience externing at the Southern District of New York showed me first hand how much can be learned from a clerkship. I hope that as a clerk in your chambers, I will be able to further the work of the court while developing litigation skills.

Enclosed please find my resume, transcript, and writing sample. I have also attached letters of recommendation from Professors Kate Andrias (212-854-5877, kandrias@law.columbia.edu); James Liebman (212-854-3423, jliebman@law.columbia.edu); and Michael Gerrard (212-854-3287, mgerra@law.columbia.edu).

Thank you very much for your consideration. Please let me know if I can supply any additional information.

Sincerely,

Jacob W. Ciafone

JACOB W. CIAFONE

240 E 27th St., Apt. 2B, New York, NY 10016 • jwc2172@columbia.edu • (303) 995-1285

EDUCATION

Columbia Law School, New York, NY
J.D., received May 2023
Honors: James Kent Scholar (1L, 3L), Harlan Fiske Stone Scholar (2L)
Awards: Best in Class (Environmental Law, Fall 2022)
Activities: *Columbia Law Review*, Managing Editor
Foundation Moot Court Program, Editor
Native American Law Students Moot Court

Boston College, Boston, MA
B.A., *summa cum laude*, in linguistics and German, received May 2018
Minor: Chinese
Honors: Gabelli Presidential Scholarship (Full-tuition merit scholarship)
Phi Beta Kappa
Study Abroad: Universität Heidelberg, Germany (Fall 2017)
Harvard Beijing Academy, China (Summer 2016)

EXPERIENCE

Sullivan & Cromwell, LLP, New York, NY
Junior Associate (offer accepted) Starting 09/2023

Hon. Jesse M. Furman, U.S. District Court for the Southern District of New York, New York, NY
Extern 1/2022-Present
Researched and drafted opinions and memoranda for pending cases

Sullivan & Cromwell, LLP, New York, NY
Summer Associate 5/2022-7/2022
Completed legal research and writing assignments in the litigation department.

United States Attorney's Office for the District of Colorado, Denver, CO
Summer Intern 5/2021-7/2021
Drafted motions and memoranda in the criminal and civil divisions in preparation for litigation.

FareHarbor Holdings, Denver, CO
Customer Support Analyst 1/2020-7/2020
Provided clients with expert product support to facilitate online booking. Worked directly with clients over phone and email to help tailor reservation software to their needs.

Fulbright Research Grant, Berlin, Germany
Research Fellow 9/2018-7/2019
Designed and completed a research project on German colonialism in China. Took graduate courses on Chinese politics and Mandarin Chinese. Organized a homestay with a German family for the duration of the grant.

LANGUAGES: German (Advanced), Mandarin Chinese (Intermediate)
ACTIVITIES: Marathon running

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/25/2023 10:26:09

Program: Juris Doctor

Jacob Walter Ciafone

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6231-2	Corporations	Talley, Eric	4.0	A
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6274-3	Professional Responsibility	Fox, Michael Louis	2.0	A
L8451-1	S. Advanced Climate Change Law [Minor Writing Credit - Earned]	Gerrard, Michael	2.0	A
L6822-1	Teaching Fellows	Liebman, James S.	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6422-1	Conflict of Laws	Monaghan, Henry Paul	3.0	A-
L6242-1	Environmental Law	Gerrard, Michael	3.0	A+
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L8253-1	S. Congressional Oversight - Past, Present, & Future	Lowell, Abbe D.	2.0	A-
L8423-1	S. Law Journal Management	Canick, Simon	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A
L6241-1	Evidence	Capra, Daniel	4.0	A-
L6473-1	Labor Law	Andrias, Kate	4.0	A-
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR
L6822-2	Teaching Fellows	Godsoe, Cynthia	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6796-1	Ex. Civil Litigation: Employment	Cacace, Karen; Clarke, Jessica	2.0	A-
L6796-2	Ex. Civil Litigation: Employment - Fieldwork	Cacace, Karen; Clarke, Jessica	3.0	CR
L6169-1	Legislation and Regulation	Briffault, Richard	4.0	A-
L6675-1	Major Writing Credit	Andrias, Kate	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Liebman, James S.	1.0	CR
L6683-1	Supervised Research Paper	Andrias, Kate	2.0	CR
L6674-1	Workshop in Briefcraft	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	A-
L6108-3	Criminal Law	Liebman, James S.	3.0	A
L6327-1	Employment Law	Barenberg, Mark	4.0	A
L6130-5	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR
L6121-30	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	P
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn; Strauss, Ilene	0.0	CR
L6116-3	Property	Glass, Maeve	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Lynch, Gerard E.	4.0	A-
L6133-4	Constitutional Law	Purdy, Jedediah S.	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-12	Legal Practice Workshop I	Dodge, Joel; Neacsu, Dana	2.0	P
L6118-1	Torts	Blasi, Vincent	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 89.0

Total Earned JD Program Points: 89.0

Best In Class Awards

Semester	Course ID	Course Name
Fall 2022	L6242-1	Environmental Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	3L
2021-22	Harlan Fiske Stone	2L
2020-21	James Kent Scholar	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	31.0

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in strong support of Jacob Ciafone's application for a clerkship.

Jacob first came to my attention as an active participant in classroom discussions in my Criminal Law course in the spring semester of his 1L year. I encourage and grade students on their participation in class, and Jacob's frequent volunteered remarks were analytically acute, on point, and revealed his thorough preparation for each class.

Jacob's performance on the final examination confirmed my high regard for his command of the materials and his analytic skills—the latter illustrated by his ability to reason his way through some of the most intricate aspects of a difficult issue-spotting exam. On the final, policy question on the exam, Jacob produced a cogent and well-organized, -written, and -reasoned essay under time pressure, which exhibited good judgment in addressing a number of philosophical debates encountered during the semester. Overall, Jacob excelled on all dimensions of the course that I assess during the semester and on the exam.

Based on Jacob's terrific performance in the course, I asked him to serve as a Criminal Law Teaching Assistant—recommending him to the professor who covered my class during a partial leave the following year and convincing him to serve as my Criminal Law TA in the semester that just ended. His support for individual students, his periodic review sessions for all students covering material I had gone through the preceding few weeks, and his advice to me about ways to improve the course were exemplary and contributed substantially to the success of my most recent semester of Criminal Law in which I substantially reorganized the course.

In the Fall of Jacob's 2L year, Jacob served as my Research Assistant on a forthcoming article on ways of restructuring of the nation's public education systems. This work gave me a fuller view of Jacob's research and writing skills. As a researcher, Jacob was creative and intellectually curious, following up on my general suggestions about matters I was interested in with a thorough review of materials he discovered on the topic and with strong and interesting analysis of what could be learned from the materials he found. His memos were clear and well-written and enabled me easily to distill the information he had discovered into relevant passages in the article.

In his other work at the Law School, Jacob has looked for other opportunities to improve his research and writing skills with an eye towards the litigation career he aims to pursue. As a 2L editor for Columbia's Foundation Moot Court program, he wrote the legal problem that served as the prompt for the Law School's 1L brief-writing competition and a bench memo to guide competition judges during oral argument. His externship this past semester in the chambers of Judge Jesse Furman of the Southern District of New York gave him experience with the research and writing that goes into judicial decisionmaking.

Jacob's work this past semester seamlessly TA'ing for me, externing with Judge Furman, serving as managing editor of the *Columbia Law Review*, and (I expect) maintaining his consistently A-level grades reveal a facility for working hard, well, and efficiently under time pressure. His interactions with his Criminal Law student colleagues and advisees and with my other RAs and TAs make clear, as well, that he is a well-liked team player who prioritizes the needs of the collective endeavor at hand.

I am confident that Jacob will make an excellent law clerk, and I strongly recommend him for that position. Please let me know if I can provide any additional information.

Sincerely,

James S. Liebman

James S. Liebman - jliebman@law.columbia.edu - 212-854-3423

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Your Honor:

I am pleased to submit this recommendation for Joseph Ciafone for a clerkship in your chambers.

In the fall semester of 2022, Joseph took my Environmental Law course. He wrote the best final exam in the class and earned an A+. I distributed his exam afterwards to the class as an exemplar of good legal writing and analysis.

Joseph is currently taking my Advanced Seminar in Climate Change Law. He is an active and constructive participant in class discussions.

Joseph is a Managing Editor of the Columbia Law Review. Obtaining this position is very challenging, and carrying it out is even more. From everything I have seen, he's doing a terrific job there.

For the reasons given above, I am happy to recommend Joseph for a clerkship in your chambers.

Sincerely,

Michael B. Gerrard
Andrew Sabin Professor of Professional Practice
Director, Sabin Center for Climate Change Law
Columbia Law School

Michael Gerrard - michael.gerrard@law.columbia.edu - 212-854-3287

June 09, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing with great enthusiasm to recommend Jacob Ciafone for a clerkship. I believe he would make a terrific addition to any chambers. I taught Jacob in Labor Law during the Spring 2022 term. He was a stellar student, consistently prepared and engaged in class discussion. During cold-calls, he analyzed doctrine accurately and with insight, noticing complications and connections that escaped many students. His exam demonstrated comprehensive understanding of the topics covered in class, including the scope of protection for employee concerted action, related problems of constitutional law and statutory interpretation, and difficult issues of federal preemption. His writing was particularly strong for a time-pressured exam.

I also supervised Jacob's major writing credit, during which he wrote a paper about the joint-employment doctrine under the National Labor Relations Act. He looked at how major franchises like McDonalds control nearly every aspect of the work environment but are shielded from having to confront collective bargaining because of the legal separation of franchisor and franchisee. He argued that the Board should return to the joint-employment standard of Browning-Ferris, which allows reserved control, rather than actually exercised control, to be the touchstone of the analysis. His paper was well argued and engaged a range of doctrine including labor, antitrust, trademark, and administrative law.

Jacob has excelled at Columbia Law School outside of the classroom as well. He has served as the managing editor of the Columbia Law Review, where he took the lead on technical edits, formatting, mentoring staff editors, and making sure the law review published on time and maintained its excellent quality. He did a terrific job in that capacity.

I know from conversations with Jacob that he hopes to pursue a career in litigation. He spent his second summer at Sullivan and Cromwell and plans to return there as a litigation associate upon graduation. He has also sharpened his writing and research skills while working as an extern in Judge Jesse Furman's chambers on the Southern District of New York.

Finally, Jacob is truly a pleasure to work with. He is timely, thorough, and collegial. He has wide ranging interests, including travel, foreign language acquisition (Chinese and German), and marathon running.

I have no doubt that Jacob will excel as a clerk, given his superior writing, reasoning, and oral advocacy skills, as well as his ability to manage complicated projects and meet competing deadlines. I hope you consider his application. I would be happy to answer any questions you might have and can be reached on my cell phone at 202-714-9288.

Sincerely,

Kate Andrias

Kate Andrias - kandrias@law.columbia.edu

JACOB W. CIAFONE
Columbia Law School J.D. '23
(303) 995-1285
jwc2172@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is based on a memorandum that I wrote as an extern in the chambers of the Hon. Jesse M. Furman of the Southern District of New York. The memorandum advises the court on how to dispose of a motion to dismiss filed in a discrimination case. The case concerns a government worker's allegations of disability discrimination against his federal employer. To protect confidentiality, I have changed the names of the parties and altered several facts and dates. Judge Furman has given me permission to use this work product as a writing sample for clerkship applications.

This memorandum concerns the disposition of a motion to dismiss in *Clark v. Wheeler*. The case arises out of a dispute over the Environmental Protection Administration's ("EPA") COVID-19 policies. Plaintiff Timothy Clark has sued EPA Administrator Andrew R. Wheeler as well as the Regional Administrator Region 2 Office in New York, Susan Waverly, and his direct supervisor Dylan O'Connor (collectively, "Defendants"). Plaintiff alleges that Defendants violated his rights under the Rehabilitation Act, the Americans with Disabilities Act ("ADA"), New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL") by denying his application for a reasonable accommodation, retaliating against him for seeking an accommodation, and denying him sick leave. For the reasons that follow, that motion should be granted in part and denied in part.

Background

The following facts are taken from the Complaint and assumed to be true for the purposes of this motion. Plaintiff has worked as a Public Relations Specialist at EPA's Region 2 Office ("the Region") in New York City since 2014. ECF No. 5 ("Compl.") ¶ 3. As a Public Relations Specialist, Plaintiff manages the Region's web presence. He posts articles about the EPA's activities in New York State and makes occasional site visits to take photographs and interview agency officials. *Id.* ¶ 4.

In response to the outbreak of COVID-19, the EPA announced a nation-wide maximum telework policy in March of 2020. *Id.* ¶ 4. That policy required the Plaintiff—and most other employees—to work remotely. *Id.* ¶ 5. As caseloads subsided in September of that year, the Region's instituted a staggered return-to-office plan that would allow for social distancing. Pursuant to the plan, each employee would report for in-person work two days a week. *Id*.

Mr. Clark did not want to return to the office. He has several health conditions which make him susceptible to severe complications from COVID-19 and feared that in-person work would put him at risk of serious illness. *Id.* ¶¶ 8, 13. Additionally, he claimed that the return-to-office plan set by Region violated the maximum-telework policy, which had been promulgated at the national level and had not been officially withdrawn. *Id.* ¶ 5. Mr. Clark voiced these concerns to his union representative. *Id*.

The union arranged for Mr. Clark to receive an additional two weeks of remote work. *Id*. When the extension lapsed, the Mr. Clark again raised concerns about returning to the office. *Id.* ¶ 6. This time, the union organized a meeting between the Mr. Clark, his supervisor Dylan O'Connor, and a human resources representative. *Id.* ¶¶ 5-6. On the advice of H.R., Mr. Clark decided to apply for a reasonable accommodation that would allow him to continue working remotely. *Id.* at 6. Management agreed to extend Mr. Clark's initial two-week extension through November 10, 2020 to allow the him to collect the medical documentation for his accommodation request. *Id.* ¶¶ 6-7. During that period, Mr. Clark's doctor diagnosed him with several autoimmune conditions. *Id.* ¶ 8. After the telework extension lapsed, Plaintiff requested and was denied several days of additional sick leave to finalize his reasonable accommodation request. The Plaintiff filed an accommodation request with supporting documentation from his doctor, but it was rejected. *Id.* ¶¶ 8-9.

Mr. Clark again contacted his union. The union submitted the first of three grievances on November 20, 2020. It complained that the Region had violated its own safety policies by, *inter alia*, failing to provide employees with masks and sanitation materials and by its nonenforcement of social distancing. *Id.* ¶ 9. In the meantime, the Plaintiff resumed in-person work two days a week. *Id.* Soon thereafter, Mr. O'Connor assigned him to photograph several events, which would

require travel to sites in the Hudson Valley. *Id.* ¶¶ 9-10. Mr. Clark, who does not drive, explained that using public transportation or a rideshare would put him at risk of contracting COVID-19. *Id.* ¶ 10. Moreover, he questioned whether the assignment was retaliation for filing a union grievance, noting that in the past, whether to take field trips had been left up to his "professional discretion." *Id.* ¶ 12.

Mr. Clark again turned to the union. On December 8, 2020, the union filed a second grievance. *Id.* ¶ 11. This grievance argued that he had been assigned to field trips in retaliation for requesting a reasonable accommodation.. *Id.* ¶ 11. Several days later, the union submitted a final grievance, which argued that Mr. Clark's reasonable accommodation request had been improperly denied. *Id.* ¶¶ 11-12. Mr. Clark pursued these grievances on a consolidated basis through the multistep dispute-resolution procedure outlined in his collective bargaining agreement ("CBA"). *Id.* ¶ 15. After mediation failed to resolve the dispute, *Id.* ¶¶ 20-21, Mr. Clark submitted the matter to arbitration in April of 2021. *Id.* ¶ 23.

While his union grievances were pending, Mr. Clark filed a formal complaint with the Region's EEO officer in January of 2021. *Id.* ¶ 16. The complaint alleged that the Region had had discriminated against the Plaintiff on the basis of a disability when it (1) denied his accommodation request for telework and (2) when it denied his post-grievance requests for sick leave. *Id.* ¶ 17. After meeting with the Plaintiff, the EEO office issued a letter of investigation in March of 2021. *Id.* ¶ 17. The letter advised that the EEO would investigate the denial of sick leave but would dismiss the complaint about the denial of a reasonable accommodation because the plaintiff had opted to address these complaints through the negotiated grievance process. *Id.*

Meanwhile, Mr. Clark's relationship with Region management remained fraught. In March, his supervisor criticized several of his articles as unsatisfactory although they were, in Plaintiff's

view, no different in quality from his previous work. *Id.* ¶ 17. Later, his supervisor confronted him about tardiness in posting website updates. *Id.* Mr. Clark maintained that the delay had been due technological issues. *Id*. On top of negative feedback, Mr. Clark alleges that his supervisor held him to unreasonable standards. Specifically, he gave the Plaintiff one week to compose four articles and make a field visit. *Id.* ¶ 18. Mr. Clark protested that no Public Relations Specialist had ever been required to write multiple articles in a single week, let alone do so while also obligated to make a time-intensive field trip. *Id.*

Similar incidents occurred through April. *Id.* ¶ 21. That May, the Plaintiff received a rating of "3 (fully successful)" during his annual review. *Id.* ¶ 22. This marked the first time the Plaintiff received a rating less than "5 (Outstanding)" in his twenty years of employment with the Corps. *Id.* The reduction in rating carries implications for the Plaintiff's annual bonus and competitiveness for future jobs with the federal government. *Id.* ¶ 23. Conflict at work caused the Plaintiff enough mental distress that he sought out mental health counseling. *Id.* ¶ 45. The Plaintiff concludes that this was an attempt to "harass, humiliate and intimidate" him. *Id.* ¶ 24.

Legal Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept "all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff." *Trustees of Upstate N.Y. Engineers Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On the other hand, the Court will not "credit conclusory allegations or

legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

Discussion

The Government contends that the entirety of Mr. Clark's complaint should be dismissed for failure to state a claim on which relief can be granted. Its motion to dismiss rest on two arguments. First, since claims of disability discrimination can only be brought against the federal government under the Rehabilitation Act, all theories of liability under other statutes must be dismissed. Second, because Mr. Clark failed to exhaust his administrative remedies, he is barred from bringing suit at this time. For the reasons that follow, the Court should grant the Government's motion in part and deny it in part.

A. The Rehabilitation Act Is the Sole Cause of Action for Disability Discrimination Against the Federal Government and the Agency Head Is the Proper Defendant

The Government's first argument for dismissal is that Mr. Clark has brought claims under the wrong statutes and named improper defendants. Plaintiff claims that the Region—a subdivision of a federal agency—unlawfully discriminated against him on the basis of a disability under the Rehabilitation Act, the ADA, NYSHRL, and NYCHRL. The Government argues that since a disability discrimination suit against a federal agency can only be maintained under the Rehabilitation Act, the ADA and the state and local claims should be dismissed. Case law makes clear that the only cause of action available to a federal employee who alleges discrimination on the basis of a disability is through section 501 of the Rehabilitation Act. *Rivera v. Heyman*, 157 F.3d 101, 103 (2d Cir. 1998). Plaintiff's silence in his opposition papers all but concedes the point. As such, the Court should dismiss all claims besides those under the Rehabilitation Act.

The Government further contends that Plaintiff's suit should be dismissed against all Defendants except the Administrator of the EPA. "Section 501 of the Rehabilitation Act is subject to the procedures and remedies of Title VII." *Verdi v. Potter*, No. 08 CIV. 2687, 2010 WL 502959 at *4 (E.D.N.Y. Feb. 9, 2010); *see also* 29 U.S.C. § 794a(a)(1). Title VII provides for a private right of action against "the head of the department, agency, or unit, as appropriate." 42 U.S.C. § 2000e-16(c). Applied to Section 501 of the Rehabilitation Act, courts in this circuit have evenly held that the an agency's head is the one and only proper defendant. *See*, *e.g.*, *Torres v. United States Department of Veteran Affairs*, No. 02 Civ. 9601, 2004 WL 691237, at *2 (S.D.N.Y. Mar. 31, 2004); *Nobriga v. Dalton, No. 94 CV 1972, 1996 WL 294354*, at *2 (S.D.N.Y. May 26, 1996); *Edinboro v. Department of Health and Human Services*, 704 F.Supp. 364, 365 (S.D.N.Y. 1988). On the other hand, there is no personal liability for "individuals with supervisory control over a plaintiff." *Tomka v. Seiler*, 66 F.3d 1295, 1313 (2d Cir. 1995).

Against this authority, Plaintiff asserts that Waverly and O'Connor are proper defendants under the statutory language of 42 U.S.C. § 2000e-16(c). Specifically, that as Regional Administrator and as supervisor of the Public Relations Team respectively, they are suable as heads of a "unit." In support of this interpretation, Plaintiff relies on *Fusco v. Perry*, No. 92-CV-1525, 1995 WL 65067 (N.D.N.Y. Feb. 9, 1995). But that case stands for precisely the opposite proposition. In *Fusco*, the court declined to follow several dated, out-of-circuit decisions that had allowed for multiple defendants. *Id.* at *2. Instead, the *Fusco* court held that when a federal employee brings a Title VII claim, "(1) only the head of a department, agency or unit may be sued . . . and (2) there can only be one defendant in such an action." *Id.* at *3. Thus the Administrator is the only proper defendant, and the Court should dismiss this suit against Defendants Waverly and O'Connor.

B. Plaintiff Has Failed to Administratively Exhaust Some, but Not All of His Claims

The Plaintiff urges four theories of discrimination: retaliation, improper denial of a reasonable accommodation, hostile work environment, and discriminatory denial of sick leave. The Court should grant Defendants' motion to dismiss the first three theories because the Plaintiff failed to exhaust administrative remedies. On the other hand, because the Plaintiff has properly exhausted the discriminatory denial of sick leave, the Court should deny dismissal.

1. *Retaliation and Denial of a Reasonable Accommodation*

Defendants argue that Mr. Clark's claims of disparate treatment and retaliation must be dismissed because he failed to exhaust administrative remedies. As a union member, Mr. Clark is covered by a CBA with the Region. CBAs with federal agencies are, in turn, regulated by the Civil Service Reform Act ("CSRA"). *See* 5 U.S.C. § 2303(b)(1)(D). This law "requires unions and federal employers to include procedures for settling grievances in their collective bargaining agreements." *Fernandez v. Chertoff*, 471 F.3d 45, 52 (2d Cir. 2006). These procedures must include the option of "binding arbitration" for any party dissatisfied with the outcome of the negotiated grievance process. *Id*.

At the same time, a CBA-covered federal employee may still elect to seek relief under the statutory procedures of the Rehabilitation Act. *See* 5 U.S.C. § 7121(d) ([a]n aggrieved employee . . . may raise the matter under either a statutory procedure or the negotiated grievance procedure). Under the CSRA, "a federal employee who is aggrieved by discriminatory personnel practices may, in the first instance, pursue his grievance under the negotiated grievance procedure or the statutory complaint procedure, *but not both*." *Fernandez*, 471 F.3d at 52 (emphasis in the original). A plaintiff who choses the negotiated grievance procedure "commits to resolving his grievance in

accordance with the procedures prescribed in the collective bargaining agreement" rather than via the statutory procedure. *Id*. The choice is "irrevocable." *Id.* (emphasis omitted).

The grievant who elects the negotiated procedure may appeal the outcome of arbitration to the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 54 (2d Cir. 2006); *see also* C.F.R. § 1614.401(d) ("A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure . . . ."). Moreover, EEOC review is a prerequisite to judicial review: "[A]n employee who chooses the negotiated grievance procedure *must* appeal the arbitrator's award to the EEOC before bringing suit." *Fernandez*, 417 F.3d at 54 (emphasis added).

Of the three grievances that Plaintiff lodged, two are relevant to discrimination. The grievance alleging retaliation and the grievance alleging a wrongful denial of a reasonable accommodation both describe potentially discriminatory conduct. By filing grievances with his union, he opted into the negotiated grievance procedure for these disputes. *Upshur v. Dam*, No. 00-CIV-2061, 2003 WL 135819 at *5 (S.D.N.Y. Jan. 17, 2003). Indeed, Mr. Clark made use of this procedure, escalating these grievances through various "steps" outlined in his CBA. *See id.* at 14-16, 19.

In April of 2021, a mediation was held to address the safety violation and retaliation grievances. *Id*. at 20. Plaintiff then participated in an Arbitration in June of 2021. *Id.* at 23. The Complaint does not the outcome of the arbitration, nor does it allege that the Plaintiff appealed the outcome to the EEOC. To exhaust a claim, "an employee must appeal the final result of the union grievance procedure with the EEOC." *Gamble v. Chertoff*, No. 04 CIV. 9410, 2006 WL 3794290 at *4 (S.D.N.Y. Dec. 27, 2006). Because he failed to appeal, Plaintiff has failed to exhaust his claim.

Accordingly, the Court should dismiss all claims arising out of the denial of a reasonable accommodation and retaliation.

Plaintiff offers several unavailing counterarguments. First, he argues that because his CBA does not require that Rehabilitation Act claims be exclusively brought under a negotiated grievance procedure, he cannot be precluded from invoking the statutory procedure. ECF No. 16 ("Pl.'s Opp'n") at 3. He supports this argument with citations to cases holding that non-federal employees do not waived their right to litigate antidiscrimination claims in court unless they have specifically agreed to mandatory arbitration thereof. *See*, *e.g.*, *Lawrence v. Sol G. Atlas Realty Co. Inc*., 841 F.3d 81, 84-85 (2d Cir. 2016). But this misses the point. Under the CSRA, Mr. Clark did have a choice between a grievance procedure and an administrative procedure. What he cannot do is pursue both. By filing a union grievance, he locked himself into the negotiated grievance procedure.

Second, Mr. Clark argues that he did, in fact, timely initiate the EEO process for his retaliation and reasonable accommodation claims. He filed a formal EEO complaint on February 18, 2021. FAC at 16. That complaint made two allegations: first that his reasonable accommodation requests were denied, and second that his request for sick leave was denied. ECF No. 14-1, at 1. The EEO complaint, however, was filed *after* he grieved the denial of his accommodation request to his union as part of his retaliation grievance in December of 2020. The Region's EEO office recognized this and dismissed the issue of a reasonable accommodation as required by regulation. *Id*.; *see also* 16 C.F.R. § 1614.107(a)(4) (requiring the dismissal of a claim "[w]here complainant has raised the matter in a negotiated grievance procedure").

2. *Hostile Work Environment*

The Complaint further makes a hostile work environment claim. The Government argues for its dismissal on the grounds that it was never raised in a union grievance or a formal EEO charge. The Plaintiff argues that his EEO complaint exhausts his hostile work environment claim, despite the fact that the complaint does not explicitly include it. Pl.'s Opp'n at 9. To be properly exhausted, claims filed in federal court "must have been either explicitly raised during the EEO process or be 'reasonably related' to the claims that were." *Hodges v. Attorney General of the United States*, 976 F. Supp. 2d 480, 490 (S.D.N.Y. 2013) (quoting *Butts v. City of New York Department of Housing, Preservation & Development*, 990 F.2d 1397, 1401-03 (2d Cir. 1993). A claim can reasonably related to the EEO charge if "the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *Butts*, 990 F.2d at 1402. This exception to the exhaustion requirement "'is essentially an allowance of loose pleading' and is based on the recognition that EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC" that the plaintiff is suffering discrimination. *Deravin v. Kirk*, 335 F.3d 195, 201 (2003) (internal quotations omitted).

"The 'reasonably related' inquiry requires a fact-intensive analysis.'" *Mathirampuzha v. Potter*, 548 F.3d 70, 76 (2d Cir. 2008) The court must focus "on the factual allegations made in the [EEO] charge itself, describing the discriminatory conduct about which the plaintiff is grieving." *Deravin*, 335 F.3d at 201. "The question is . . . whether the charge "contain[s] the 'factual underpinnings' of a hostile work environment . . . claim." *Mathirampuzha*, 548 F.3d at 77. Thus, for a hostile work environment claim to be reasonably related to the charge, the charge must contain facts that suggest that the Region is "permeated with discriminatory intimidation, ridicule, and insult, that is

sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993). Moreover, "the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment." *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir.2002). The facts alleged in the charge must be considered under "all the circumstances," with special attention to the "frequency and severity of conduct." Williams v. New York City Hous. Auth., 61 F.4th 55, 74 (2d Cir. 2023).

Plaintiff's EEO charge does not contain the factual underpinnings of a hostile work environment claim. All in all, the charge describes two instances over several months in which the Region denied Mr. Clark sick leave. But mere denial of leave—even when it causes the Plaintiff mental anguish—fails to "rise to the level of *objectively* severe and persistent harassment." *Lee v. Saul*, No. 19-CIV-6553, 2022 WL 873511, at *14-13 (S.D.N.Y. Mar. 23, 2022) (emphasis added). Without allegations of more serious harassment, the EEOC cannot reasonably be expected to have included a hostile work environment in its investigation of Mr. Clark's charge. Because Plaintiff has failed to exhaust his hostile work environment claim, the Court should grant the Government's motion to dismiss it.

3. *Denial of Sick Leave*

The Plaintiff never raised his denial of sick leave in a union grievance. Rather, by "fil[ing] a formal written complaint under the statutory EEO complaint procedure," the Plaintiff properly elected the statutory route. *Savarese v. U.S. Dep't of Hous. & Urb. Dev.*, No. 04 CIV. 3660, 2005 WL 387152 at *2 (S.D.N.Y. Feb. 16, 2005). If the relevant agency does not take final action on a complaint within 180 days after its filing, the complainant may bring an action in United States district court. 29 C.F.R. § 1614.407(b). Mr. Clark filed a formal complaint with the EPA's central EEO office on February 18, 2021. The allegations that the EEOC agreed to investigate were

discriminatory denials of four requested days of sick leave. 18-1; 18-6. When this suit was in September of 2022, over 180 days later, the EPA had still not taken final action on the complaint. Thus the denial of sick leave claim was administratively exhausted and is properly before the Court. The motion to dismiss this claim should be denied.

Conclusion

For the foregoing reasons, the Court should grant Defendants' motion to dismiss claims under the ADA and state law, as well as any claim against Defendants O'Connor and Waverly. The Court should also dismiss all claims arising out of retaliation, improper denial of a reasonable accommodation, or a hostile work environment. On the other hand, the Court should deny Defendants' motion to dismiss claims arising out of the discriminatory denial of sick leave.

Applicant Details

First Name	**Ciara**
Middle Initial	**N**
Last Name	**Cooney**
Citizenship Status	**U. S. Citizen**
Email Address	**cnc63@georgetown.edu**
Address	**Address** Street **811 4th St NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7039753415**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William E. Leahy Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

O'Sullivan, Julie
osullij1@law.georgetown.edu
Sirota, Rima
rs367@law.georgetown.edu
(202) 353-7531
Wolfman, Brian
wolfmanb@georgetown.edu
McCord, Mary
mbm7@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CIARA COONEY
cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington, D.C. 20001

June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a recent Georgetown University Law Center graduate and I am applying for a clerkship in your chambers for the term beginning in 2025.

My resume, law school transcript, and writing sample are enclosed. You will also be receiving letters of recommendation from Professors Brian Wolfman (202-661-6582), Mary McCord (202-661-6607), Julie O'Sullivan (202-662-9394), and Rima Sirota (202-662-6728) on my behalf. Thank you for your consideration.

Respectfully,

Ciara Cooney

CIARA COONEY

cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington D.C. 20001

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER, J.D., *magna cum laude* May 2023

GPA: 3.90

Activities: William E. Leahy Moot Court Competition (Best Advocate)
American Criminal Law Review (Volume 60 Managing Editor)
Supreme Court Institute (Research Assistant)
Professor Rima Sirota (Research Assistant for Legal Practice)

Honors: Order of the Coif
Associate Dean's Award for Excellence in Clinic, Professor Brian Wolfman
CALI Award for Excellence in Criminal Justice, Professor Julie O'Sullivan

Publications: *Anything but Compassion: The Conflict Between Exhaustion and Compassionate Release*, 61 Am. Crim. L. Rev. __ (forthcoming 2023)
Discourse YouTube Series, Episode 01: Originalism (Moderator) (link)

UNIVERSITY OF VIRGINIA, B.A. with High Distinction in Public Policy & Leadership May 2017

Capstone: *Issues Impacting the Aging, Low-Income Population in Albemarle County*

EXPERIENCE

U.S. COURT OF APPEALS, TENTH CIRCUIT Aug. 2025–2026 (forthcoming)
Law Clerk to the Hon. Scott M. Matheson, Jr.

APPELLATE COURTS IMMERSION CLINIC, Washington, D.C. Jan.–May 2023
Student Attorney

- Argued before D.C. Circuit panel on whether a statutory filing deadline was a nonjurisdictional, claim-processing rule and whether equitable tolling was appropriate (link to argument audio).
- Co-authored briefs addressing the Civil Service Reform Act's jurisdictional requirements and equitable tolling; *Younger* abstention; and compassionate release.

RIGHTS BEHIND BARS, Washington, D.C. Sept.–Nov. 2022
Legal Extern

- Drafted opening brief section on Eighth Amendment deliberate indifference to medical needs; provided research on ADA liability and religious freedom protections in prisons.

KAPLAN HECKER & FINK LLP, New York, NY May–July 2022
Summer Associate; Law Clerk (forthcoming Sept. 2023)

- Drafted reply brief section on Prison Litigation Reform Act's three-strikes rule.
- Researched and wrote memoranda on legal issues including liability for defamation, Title IX developments, judicial review of arbitration, and federal and state criminal procedure.

GEORGETOWN ICAP, Washington, D.C. Aug.–Dec. 2021
Constitutional Impact Litigation Practicum Student

- Authored memorandum on a circuit split under Federal Rule of Civil Procedure 15(c); provided research for amicus brief on DACA's public safety benefits.

OFFICE OF THE PUBLIC DEFENDER, Arlington, VA May–July 2021
Legal Intern

- Drafted motion to suppress evidence collected from a vehicle on Fourth Amendment grounds.

PERSONAL

- Fledgling sketch-artist. Avid reader. Flat-white enthusiast. British, Irish, and American citizen.

Record of: Ciara Noelle Cooney
GUID: 802370126

GEORGETOWN UNIVERSITY
OFFICE OF THE LAW CENTER REGISTRAR
WASHINGTON, D.C. 20001
(202)662-9220

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 07, 2023
Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	11	Civil Procedure Charles Abernathy	4.00	A-	14.68	
LAWJ	004	11	Constitutional Law I: The Federal System Josh Chafetz	3.00	A-	11.01	
LAWJ	005	12	Legal Practice: Writing and Analysis Diana Donahoe	2.00	IP	0.00	
LAWJ	008	11	Torts Girardeau Spann	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	41.69	3.79
Cumulative	11.00	11.00	41.69	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	002	11	Contracts Anupam Chander	4.00	A-	14.68	
LAWJ	003	11	Criminal Justice Julie O'Sullivan	4.00	A+	17.32	
LAWJ	005	12	Legal Practice: Writing and Analysis Rima Sirota	4.00	A+	17.32	
LAWJ	007	91	Property Madhavi Sunder	4.00	A-	14.68	
LAWJ	1701	50	International Economic Law and Institutions Sean Hagan	3.00	A	12.00	
LAWJ	611	04	Restorative Justice: Law and Policy Intersections Thalia Gonzalez	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	76.00	4.00
Annual	31.00	30.00	117.69	3.92
Cumulative	31.00	30.00	117.69	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	07	Administrative Law Glen Nager	3.00	A	12.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Mary McCord	5.00	A	20.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	A	16.00	
LAWJ	317	05	Negotiations Seminar Kondi Kleinman	3.00	A	12.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.00	4.00
Cumulative	46.00	45.00	177.69	3.95

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	165	07	Evidence Mushtaq Gunja	4.00	A-	14.68	
LAWJ	1655	05	Criminal Justice Reform Seminar Shon Hopwood	3.00	A	12.00	
LAWJ	361	09	Lawyers' Ethics Abbe Smith	2.00	B+	6.66	
LAWJ	455	01	Federal White Collar Crime Julie O'Sullivan	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.34	3.80
Annual	28.00	28.00	109.34	3.91
Cumulative	59.00	58.00	227.03	3.91

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1447	08	Mediation Advocacy Seminar Kelly Walsh	2.00	A-	7.34	
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program) Sandeep Prasanna		NG		
LAWJ	1491	119	~Seminar Sandeep Prasanna	1.00	A-	3.67	
LAWJ	1491	121	~Fieldwork 3cr Sandeep Prasanna	3.00	P	0.00	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A	8.00	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	A-	11.01	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	11.00	8.00	30.02	3.75
Cumulative	70.00	66.00	257.05	3.89

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments	1.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic		NG		
LAWJ	504	30	~Writing	4.00	A-	14.68	
LAWJ	504	80	~Research and Analysis	4.00	A	16.00	
LAWJ	504	81	~Advocacy & Client Relations	4.00	A	16.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	14.00	54.68	3.91
Annual	26.00	22.00	84.70	3.85
Cumulative	85.00	80.00	311.73	3.90

End of Juris Doctor Record

This electronic seal and signature serve as official certification on the following document.

Cornelia Gustafson
Interim Assistant Dean & Registrar

08-JUN-2023

GEORGETOWN UNIVERSITY LAW CENTER
EXPLANATION OF GRADING SYSTEM

Student matriculating in Fall 1998 or later

GRADE	Quality Points
† A+	4.33
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D	1.00
F	0.00

Averages are rounded to two decimal places.

Students who matriculated prior to Fall 1998

GRADE	Quality Points
A	12.000
A-	11.000
B+	10.000
B	9.000
B-	8.000
C+	7.000
C	6.000
C-	5.000
D	3.000
F	0.000

Averages are carried to three decimal places.

Center for Transnational Legal Studies-London Prior to Fall 2011 ‡

GRADE	Explanation
05	Outstanding
04	Excellent
03	Good
02	Fair
01	Fail

‡ Fall 2011 through Summer 2012, the Center for Transnational Legal Studies awarded the grades from 5.0 (highest score) to 1.0 (failing score), in 0.5 increments.

† In Fall 2009, the faculty established a grade of A+ for truly extraordinary academic performance in a law school class. From Fall 2009 to Spring 2020, the A+ grade carried quality points of 4.00. Beginning Summer 2020, the A+ grade carries quality points of 4.33.

An average may be computed by multiplying the numerical equivalent of each letter grade by the credit value of the course, then dividing the total thus obtained by the total number of quality hours (QHRS).

A semester is 13 weeks of class meetings. Class periods are 55 minutes per credit.

Grades for courses taken at other institutions appear on the student's transcripts but are not computed into the Law Center's average.

Current Grading Symbols

AF -Administrative F* (The student failed to take the examination or complete other course requirements.)
AP -Administrative Pass** (The student passed the course but did not stop writing before the time allowed for the examination expired.)
AU -Audit (non-degree only)**
CR -Administrative Credit**
IP -Course in Progress**
NG -Non-Graded Course**
NR -Grade Not Recorded**
P -Pass **
H -Honors**
W -Withdrawal**

Prior Grading Symbols

EW -Excused Withdrawal
PR -Proficient
S -Satisfactory
U -Unsatisfactory
NC -No Credit

Other Symbols

EHRS - Earned Hours
LW - Legal Writing Requirement
QHRS - Quality Hours
QPI - Quality Point Index
QPTS - Quality Points
RC - Residency Requirement
R - Include/Exclude Credit

* Included in quality hours and grade point average.
** Not included in quality hours or grade point average.

Inquiries may be addressed to:
Office of Registrar, Georgetown University Law Center
600 New Jersey Avenue, N.W. Washington, D.C. 20001
Tel: (202) 662-9220 Fax: (202) 662-9235
lawreg@law.georgetown.edu

RELEASE OF INFORMATION

In accordance with the Family Rights and Privacy Act of 1974, this transcript is released to you at the request of the student with the condition it will not be made available to any other party without the written consent of the student.

Send To : CIARA COONEY

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 2022

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Ciara Cooney to you with all the enthusiasm that decorum permits. Ciara is simply terrific—as a student and as a person.

Ciara (pronounced “Keera”) is very, very bright, and is at the very top of a large and competitive class. If she keeps up the good work and her GPA (3.95 as of this writing), I imagine she will be more than competitive for summa cum laude honors at graduation (last year, the cut-off for magna (top 10%) honors was 3.78). Ciara was enrolled in my Criminal Justice in the spring 2021 semester and earned the best exam out of 59 students, garnering one of the only grades of “A+” I have ever awarded. She again easily earned an “A” in my Federal White Collar Crime class this semester.

We teach basic constitutional criminal procedure in our first year Criminal Justice class, covering the Fourth, Fifth, and Sixth Amendments. Ciara’s exam rivaled my grading sheet and, given that I have been teaching the subject-matter for 26 years and wrote the exam, her performance was spectacular. Ciara knew the voluminous subject-matter cold, showcased outstanding analytical abilities, and demonstrated surprisingly (for her age) mature and balanced judgment in resolving close questions.

The spring semester was conducted entirely by zoom but it was a wonderful class, in great part because of Ciara’s participation. She is not a “gunner”; she was judicious in her contributions but she was clearly engaged in the discussion and volunteered often. At one point in the semester, a controversy arose because one of our adjuncts was recorded making racially offensive statements. I offered the students the opportunity to come to what I termed a “listening session,” during which I wanted to hear from them about the controversy and any other concerns they had about the institution or our classroom environment. Ciara was the only white student to show up, and she, too, was there to listen and learn.

Ciara enrolled this last semester in my Federal White Collar Crime class. This course provides a deep dive into a number of frequently charged federal statutes, including perjury, false statements and claims, fraud of all varieties, conspiracy, public corruption (§ 201, the Hobbs Act, and the Foreign Corrupt Practices Act), RICO, and money laundering. We also cover subjects such as mens rea, corporate criminal liability, the U.S. Sentencing Guidelines, grand jury practice, discovery, Fifth Amendment as applied to testimony (and immunity issues) and tangible objects, plea bargaining, parallel proceedings, and the extraterritorial application of criminal statutes. In short, it is a very demanding class in terms of both subject-matter and the sheer volume of law and required reading. Again, Ciara wrote just a terrific exam. Her “A” reflected a comprehensive knowledge of complex materials, terrific analytical ability, and good judgment in resolving close questions.

Unlike most of my students, Ciara is interested in starting her career on the public defense side. This is born of her experiences at two firms engaging in both federal white-collar defense work and the pro bono defense of a Nigerian national incarcerated in the U.K. and fighting extradition to the United States to face credit card fraud charges. Ciara’s ambition was, until those experiences, to become an AUSA, but observing the different processes and outcomes applied to wealthy, as opposed to low-income, defendants caused her to reassess. She felt that many prosecutors were deaf to facts that conflicted with their theory of guilt, presumed guilt rather than innocence, and were dismissive of the humanity of their targets and indifferent to the human impact of their choices. Although I am a former federal prosecutor, I have encouraged Ciara in her ambition because it is the product of experience and a deep commitment to a fair criminal process. She has the extraordinary gifts and passion to ensure that justice is fairly done in our courtrooms by putting prosecutors to the test.

I know personal chemistry is hard to forecast, but I will say that I have found Ciara to be refreshingly straightforward, unassuming, and earnest. And I have truly enjoyed all my many interactions with her. Ciara has a good sense of humor and is a lively and interesting person—and someone I believe will be a very positive presence in chambers. In this regard, I know that many judges like to know a little more about the backgrounds of applicants they are considering inviting into the chambers family and perhaps I can offer some information of value.

Ciara was born in a village in the British countryside to an American mother and an Irish father. Her family immigrated to the United States when she was 9, and she remains cosmopolitan in attitude. She aspires to travel more widely than her father, who has lived in 5 countries and traveled to more than 65. Despite the pandemic, Ciara’s current record of traveling to 27 countries shows her commitment to this endeavor. It is Ciara’s mother, however, who is her role model. Ciara describes her mom as a force of nature, beloved by all. A corporate immigration lawyer who runs a large office and is the family breadwinner, Ciara’s mother somehow got three kids off to school every day and cooked dinner every night. Ciara says that her mom would show up at all Ciara’s field hockey games, running across the field in kitten heels and hauling a briefcase or two bulging with work. Ciara professes herself “dumbfounded” by her mother’s ability to balance everything and aspires to model her mother’s strength and kindness. I believe that Ciara is well on her way. She has modeled a conscientious commitment to others who need her help by

Julie O'Sullivan - osullij1@law.georgetown.edu

undertaking to tutor first-year students. She works very hard, but never at the sacrifice of friendships or family.

I apologize for going on at such length, but I belief that Ciara is a star. She has the native smarts, developed skills, passion, personality, and values to be an extraordinary clerk. And she is someone who you will be delighted—and proud—to mentor in the years ahead.

Sincerely yours,

Julie R. O'Sullivan
Agnes Williams Sesquicentennial Professor

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Ciara Cooney for a judicial clerkship. Ms. Cooney was the top student in my Legal Practice class during her first year at Georgetown Law, and she was an exceptional research assistant for me in her second year.

Legal Practice is a year-long legal research and writing course, organized so that students research and write (and re-write, and re-write again) a number of increasingly complex assignments throughout the year. The Fall semester focuses on objective memoranda, while in the Spring we turn to persuasive advocacy. Throughout the year, I also include a number of smaller units designed to introduce students to other practical lawyering skills such as oral argument and writing for a variety of audiences.

Ms. Cooney earned the highest total score out of fifty-one students and an A+ grade. She excelled on every measure. For example, I had students independently research and write a complex appellate brief on a witness identification issue at the end of the spring semester. Ms. Cooney's submission was so accomplished that I posted it for the entire class as a model of what I was looking for. Additionally, Ms. Cooney earned top marks on timeliness, participation, attendance, and effort on ungraded assignments; these professionalism qualities are sometimes overlooked and undervalued by law students, but not by Ms. Cooney.

Given her performance in my Legal Practice class, Ms. Cooney was an easy pick to be my part-time research assistant during the fall semester of her second year. I made an excellent choice. To help me prepare an upcoming writing problem for my first-year students, Ms. Cooney researched and wrote an appellate brief for one side in a Terry stop matter. Ms. Cooney worked independently, coming to me with questions only after she had thought them through. Our conversations and her final work product resulted in a far more focused and manageable writing problem for my students.

In addition to working as my research assistant, she was also selected as a research assistant for Georgetown's Supreme Court Institute. I asked the Director of the Institute about Ms. Cooney's performance in this role, and her experience with Ms. Cooney echoes my own:

> Ciara has demonstrated the highest level of responsibility, reliability, integrity, maturity, discretion, and professional demeanor. She is consistently responsive, knows when to ask questions, is fastidious about details, and meets deadlines without reminders. Ciara has stood out among her peers for her enthusiasm and positivity and has been an exceptional collaborator in ensuring the success of our program. I could not be happier that she accepted my offer to serve as an RA for the Supreme Court Institute for a second year.

Throughout law school, Ms. Cooney continued to seize opportunities to further hone her research and writing skills. She was elected Managing Editor of the American Criminal Law Review, which also published her note on exhaustion and compassionate release. Through the Appellate Courts Immersion Clinic, Ms. Cooney argued to the D.C. Circuit that a thirty-year-old precedent should be overturned, and she helped draft several of the briefs. Shortly before graduation, Ms. Cooney was invited to moderate a discussion on originalism between Georgetown's Dean and the Executive Director of Georgetown's Center for the Constitution.

I asked Ms. Cooney why she is seeking a clerkship. She cited her love of problem-solving and the opportunity to learn how advocates and judges shape the law. She also believes quite simply that she would be good at it and would enjoy it. Based on my experience with Ms. Cooney, that is absolutely right. She is detail-oriented, reliable, an effective researcher, and a clear and concise writer; she is clear-eyed in assessing the strengths and weaknesses of legal arguments; and her positive attitude is second to none.

I recommend Ms. Cooney to you with no hesitation.

Sincerely,

Rima Sirota

Rima Sirota - rs367@law.georgetown.edu - (202) 353-7531

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

June 7, 2023

Re: Clerkship recommendation for **Ciara Cooney**

I enthusiastically recommend Ciara Cooney to serve as your law clerk.

I got to know Ciara in the spring semester of 2023 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Ciara's work in the seminar later in this letter.) I worked with Ciara nearly daily for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Ciara would be an excellent law clerk. Ciara's work in our clinic was very strong. Her legal analysis was generally spot on. She never looked for easy ways out of tough legal problems. Her writing was clear and straightforward. Ciara works hard. She was highly dedicated to her clients and was a terrific colleague to the other students and her clinic mentors.

For these reasons, I awarded Ciara the Associate Dean's Award for Excellence in Clinic—which I give to only two students over the entire academic year. This award is the highest graduation recognition that a Georgetown Law clinic student can achieve. According to the school "this award recognizes students who are nominated by their clinic faculty

600 New Jersey Avenue, NW Washington, DC 20001-2075
PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

supervisors and acknowledges their exceptional work as student attorneys on behalf of the clinic's clients."

I'll turn now to Ciara's major clinic projects. First, Ciara was asked to write a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a statute of limitations applicable in certain employment-discrimination suits is "jurisdictional" and therefore not subject to equitable tolling. Working with two other students, Ciara explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. The team also argued that, under the particular circumstances of the case arising from the pandemic, the deadline should be tolled. Ciara did an excellent job researching and writing the brief. Ciara also had the rare opportunity as a student to argue the appeal to the D.C. Circuit. Ciara prepared painstakingly. We mooted her almost daily for nearly three weeks. She mastered the record. She tracked down and read every authority. After each moot court, she responded to feedback and improved her presentation. She did all this while maintaining full responsibility for her other pending clinic project (the cert petition described below). Ciara did a beautiful job with the argument.

Ciara's other two projects were equally challenging. She was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most practicing lawyers, yet Ciara understood them quickly, and she, along with two colleagues, produced a first-rate petition.

Ciara's final project was her largest. Again working with two other students, Ciara prepared a petition for a writ of certiorari on the question whether a prisoner's petition for compassionate release under the First Step Act may rely on legal errors in the prisoner's underlying criminal proceedings or whether those errors may be considered only on habeas review. The case is pending, and confidentiality concerns preclude me from disclosing much more. Suffice it to say that crafting a brief based on the traditional pedestals of cert-worthiness—a circuit conflict, the importance of the question presented, etc.—is an unusual task for a student. Yet Ciara quickly understood how this project differed from writing a normal appellate brief. She brought surprising sophistication to the assignment, along with the clear writing and analytical prowess I've already described.

* * *

As noted at the beginning of this letter, my clinic students are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal clerkships. Ciara's work in this class was consistently strong. On the most difficult assignment—a motion to dismiss for lack of appellate jurisdiction arising from a complex mass-tort class action—Ciara received a 3.9 on a 4.0 scale, the second highest grade in the course. Overall, Ciara earned an "A" in a class of high-preforming students.

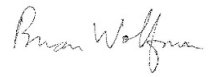
* * *

I want to address a few of Ciara's attributes beyond her pure legal ability.

Ciara generally operates independently. She tries to figure things out on his own—and generally succeeds—but she also knows when to contact mentors to seek guidance. As already indicated, she's a hard worker, and, even when under pressure, she stays on task and completes the job without getting rattled. Ciara is also honest and forthright and is willing to disagree with colleagues and mentors because she wants to get the job done right. Ciara also works very well with colleagues and mentors and has a great sense of humor. In short, she will be an excellent addition to any judicial chambers.

As I said at the beginning, I recommend Ciara Cooney for a clerkship with enthusiasm. If you would like to talk about Ciara, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law
Institute for Constitutional Advocacy and Protection
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

We write to express our enthusiastic support for Ciara Cooney's application to serve as a law clerk in your chambers. Ciara's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the fall of 2021 was consistently exceptional. Her clear and cogent writing style, professionalism, and ability to operate across a broad range of substantive legal areas would hold her in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Ciara not only produced outstanding work in each case on which she worked, but she did so in a professional and efficient manner that will serve her well as a young lawyer. She earned an A in this rigorous course.

At ICAP, we try to give our best students, like Ciara, a broad range of work that allows them to develop their legal skills as they demonstrate their talents. Among other assignments, Ciara researched a circuit split involving the application of the relation-back rule of Fed. R. Civ. P. 15(c)(1)(C) where the identity of a defendant is unknown to the plaintiff at the time the complaint is filed. Because of her exceptional work on this research, we asked her to draft a portion of what later became a petition for certiorari in *Herrera v. Cleveland*. Ciara's research demonstrated her attention to detail and her analysis was clear, thorough and well written. Indeed, it led us to assign her the first draft of an amicus brief for filing in the Fifth Circuit in *Texas v. United States*, a case involving a challenge to the creation of the DACA program. The brief was on behalf of a bipartisan group of current and former prosecutors and, although Ciara was able to work from an earlier amicus brief that ICAP had filed in the Supreme Court in the challenge to the rescission of DACA, this new brief required substantial updating and an entirely new section of argument. Ciara's research was again extremely thorough and her writing exceptional. She also mastered the Fifth Circuit's rules so that our brief was in compliance.

Besides her work on *Herrera* and *Texas v. United States*, Ciara completed half of a 50-state survey of state commitment and release procedures following a not-guilty-by-reason-of-insanity (or equivalent) verdict. This detailed and substantial work product will help ICAP assess whether potential litigation in this area may be warranted.

Worth mentioning, as well, is the careful attention to detail that Ciara displayed in performing even mundane tasks like citechecking and proofreading ICAP briefs before filing. Ciara recognized the importance of scrupulous accuracy and adherence to bluebooking rules. We have no doubt that her skills across the board will make her a valuable asset in chambers.

Finally, in addition to Ciara's significant contributions to ICAP's work, Ciara was also a thoughtful contributor to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Ciara was consistently well prepared and her contributions in these weekly discussions revealed her deep engagement with the material.

Together we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Ciara would be a welcome addition to any judge's chambers. She is mature, collegial, and thoughtful. Her legal writing is well organized and crisply articulated. And her flexibility across substantive legal areas is top-notch. We anticipate an impressive legal career ahead for Ciara.

We would be delighted to answer any further questions that you might have. Thank you for considering Ciara's application.

Respectfully submitted,

Mary B. McCord
Executive Director & Visiting Professor of Law
mbm7@georgetown.edu

Kelsi Brown Corkran
Supreme Court Director & Senior Lecturer
kbc74@georgetown.edu

CIARA COONEY
cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington, D.C. 20001

WRITING SAMPLE

The attached writing sample is a final paper submitted for my seminar course, Federal Practice: Contemporary Issues, co-taught by Professor Irv Gornstein and Judge Cornelia Pillard. The paper discusses the development of the major questions doctrine and seeks to identify a judicially-administrable standard post-*West Virginia v. EPA*, 142 S. Ct. 2587 (2022). I am the sole author of this work and it has not been edited by anyone else.

WHAT MAKES A QUESTION MAJOR?—IDENTIFYING A JUDICIALLY ADMINISTRABLE MAJOR QUESTIONS STANDARD AFTER *WEST VIRGINIA V. EPA*

INTRODUCTION

The major questions doctrine, which has been looming in the wings of administrative law for several decades, took center stage in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There, the Supreme Court determined that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act to establish a "best system of emission reduction" that would result in a "sector-wide shift in electricity production from coal to natural gas and renewable."[1] In doing so, the highly-anticipated decision confirmed the major questions doctrine is an independent canon of construction for courts reviewing administrative agency actions. While the decision justified the need for a major questions doctrine and detailed how a major questions analysis should proceed, it did not explain when a major questions analysis is necessary. Phrased differently, what makes a question major? This Paper seeks to provide a judicially-administrable analytical framework for identifying major questions. The Court's articulation of the major questions test in *West Virginia v. EPA* is the starting point and a close analysis of the major questions doctrine's foundations provides further clarification.[2]

Part I discusses the major questions doctrine's foundations and interrelated judicial review principles, specifically, the nondelegation doctrine and *Chevron* deference. Part II briefly summarizes *West Virginia v. EPA* and explains the nuances between the majority's major

[1] 597 U.S. ___, 142 S. Ct. 2587, 2603 (2022).

[2] As a threshold matter, this Paper accepts the existence of the major questions doctrine, as developed by the Supreme Court's jurisprudence and formally recognized in *West Virginia v. EPA*. This Paper does not address legitimate arguments that *West Virginia v. EPA*, and the major questions doctrine generally, is an erroneous departure from traditional statutory interpretation principles. Justice Kagan effectively made that argument in dissent and it has been further articulated by academics. *See West Virginia v. EPA*, 142 S. Ct. at 2633-34 (Kagan, J., dissenting); *see also, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64. Rather, this Paper accepts the validity of the major questions doctrine and seeks to derive a legitimate and administrable standard for identifying major questions cases.

questions standard and Justice Gorsuch's alternative approach, presented in concurrence. Part III first identifies several incorrect approaches to identifying major questions cases arising in the courts of appeals post-*West Virginia v. EPA*. These approaches conflict with the major questions doctrine or lack judicial administrability. Part IV then proposes the following judicially-administrable, element-based test to determine when a major questions analysis is needed. A major questions case requires two distinct elements: (1) a novel and extensive agency action based on the history and breadth of the agency's authority; *and* (2) the agency action implicates issues of great political and economic significance.[3] The factors considered in *West Virginia v. EPA* and their "common threads"[4] in prior cases reveal how the elements are satisfied. Requiring a sufficient showing of both elements ensures only "extraordinary cases" where "common sense" suggests Congress may not have delegated the authority at issue prompt a major questions analysis.[5] This approach, implicit in *West Virginia v. EPA*, has subsequently been endorsed by the U.S. Court of Appeals for the D.C. Circuit.[6]

I. THE FOUNDATIONS OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine falls within the broader framework for judicial review of agency action. There are two foundational principles of judicial review critical to understanding the major questions doctrine: delegation of authority to administrative agencies and *Chevron* deference. This Part will (A) provide a brief synopsis of delegation principles and the relationship to judicial review; (B) explain the deferential standard of review established by *Chevron*; and (C) trace the subsequent development of the major questions doctrine.

[3] 142 S. Ct. at 2608.
[4] *Id.* at 2609.
[5] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[6] *See* Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 363–64 (D.C. Cir. 2022).

A. Congressional Delegation and Judicial Review of Agency Action

Separation of powers principles are derived from the vesting clauses of the U.S. Constitution, which assign all executive, legislative, and judicial powers to the corresponding branches.[7] The vesting of legislative power in Congress has been determined to include "a bar on its further delegation."[8] This prohibition on Congressional delegation of "powers which are strictly and exclusively legislative" is referred to as the nondelegation doctrine.[9]

To abide by the nondelegation doctrine, Congress must include an "intelligible principle" in the authorizing statute to guide the executive agency.[10] The intelligible principle standard is viewed broadly and Congressional delegations of authority to the executive branch have almost uniformly been upheld.[11] Congress has violated the nondelegation doctrine on only two occasions in 1935.[12] Since then, the Court has consistently upheld Congressional delegations of authority to executive agencies, prompting scholars to argue the nondelegation doctrine is a separation of powers red herring.[13] But some justices appear interested in reinvigorating the nondelegation doctrine. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), a plurality upheld Congress's delegation of authority to the Attorney General to determine how the Sex Offender Registration and Notification Act (SORNA) applied to sex offenders convicted prior to passage of SORNA.[14] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented and called for the

[7] Article I of the Constitution provides "[a]ll legislative Powers … shall be vested in a Congress of the United States." U.S. Const. art I, §1. Article II then vests the executive power in the President, U.S. Const. art II, §1, and Article III vests the judicial power in the Supreme Court, and inferior courts created by Congress, U.S. Const. art. III, §1. *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PENN. L. REV. 379, 389 (2017).
[8] *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality).
[9] *See id.*; 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:13 (3d ed. 2022).
[10] *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
[11] *See* Whittington & Juliano, *supra* note 7, at 392-406.
[12] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[13] *See generally* Whittington & Juliano, *supra* note 7; Eric A. Posner & Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).
[14] *Gundy*, 139 S. Ct. at 2121–24.

Court to "revisit" the nondelegation doctrine.[15] According to Justice Gorsuch, the Court has not been fulfilling its "obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."[16] He proposed a more stringent standard for the "intelligible principle" test.[17] Concurring in the judgment in *Gundy*, Justice Alito also expressed his "support" for a reconsideration of the Court's approach, which has "uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[18]

Whether or not the Court bolsters the nondelegation doctrine, it frames the major questions doctrine because it defines the outer limits of authority that may be delegated to an agency. Congress cannot delegate "powers which are strictly and exclusively legislative,"[19] but Congress also "cannot do its job absent an ability to delegate power under broad general directives."[20] Within these hazy and indeterminate constraints, the Court has recognized an area of permissible delegation. As discussed further *infra*, the major questions doctrine is then a tool to determine whether Congress in fact delegated the authority asserted by the agency.

B. Chevron *Deference: Implicit Delegation*

Congress delegates powers to administrative agencies by authorizing the agency to administer statutes.[21] The agencies then "make all sorts of interpretive choices" about the statutes they administer.[22] Yet, it is emphatically the "province and duty" of the courts to determine "what the law is."[23] Therefore, prior to 1984, it was "universally assumed" that courts had the ultimate

[15] *Id.* at 2131 (Gorsuch, J., concurring).
[16] *Id.* at 2135.
[17] *Id.* at 2141.
[18] *Id.* at 2130–31 (Alito, J., concurring in the judgment).
[19] Wayman v. Southard, 23 U.S. 1, 42 (1825).
[20] Mistretta v. United States, 488 U.S. 361, 372 (1989).
[21] United States v. Mead Corp., 533 U.S. 218, 227 (2001).
[22] *Id.*
[23] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"pronounc[ement] on the meaning of statutes."[24] Administrative agencies interpretations could receive some deference, but only to the extent they were persuasive.[25] Then, in an unsuspecting landmark case, the Court announced "a new approach to judicial review of agency interpretations of law."[26] *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984), held that courts must to defer to administrative agencies reasonable interpretations of ambiguous statutes that they administers.[27] Judicial deference was justified by an "implicit rather than explicit" delegation to of authority to the agency.[28] *Chevron* "vastly expanded the sphere of delegated agency lawmaking" by determining that Congress "impliedly delegated primary authority to [agencies] to interpret [ambiguous] statute[s]."[29]

The reaction to *Chevron* deference has been vehement and lasting.[30] Current critics argue it is an afront to the Constitution and undermines separation of powers. For instance, Justice Thomas views *Chevron* deference as in tension with Article III's vesting clause because it "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over the to the Executive."[31] And Justice Kavanaugh, while serving on the D.C. Circuit, criticized *Chevron* deference as an "atextual intervention by courts" that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[32] While *Chevron* still remains good law, the

[24] *See* Thomas W. Merrill, *The Story of* Chevron, 66 Admin. L. Rev. 254, 257 (2016).
[25] *See* Skidmore v. Swift & Co., 323 US. 134 (1944).
[26] Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006).
[27] 467 U.S. 837, 842 (1984).
[28] *Id.*
[29] Merrill, *supra* note 24, at 256.
[30] *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L. J. 1613, 1615–20 (2019).
[31] Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[32] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016).

Court has sought to significantly limit its scope.[33] The major questions doctrine arose as one of these limiting principles.[34]

C. The Development of a Major Questions Doctrine

In *West Virginia v. EPA*, the Court formally "announce[d] the arrival of the 'major questions doctrine.'"[35] But the roots of the major questions doctrine trace back almost three decades.[36] Although the "Court ha[d] never even used the term 'major questions doctrine'" before *West Virginia v. EPA*,[37] the "'label' … took hold because it refer[ed] to an identifiable body of law" with common threads recognized by scholars and jurists.[38] The major question doctrine seemingly sought to address (1) which institution should have comparative authority, the judiciary or the executive agency, to interpret the scope of statutory delegations, as governed by *Chevron* deference; and/or (2) the permissible scope of Congressional delegations to administrative agencies, as restrained by the nondelegation doctrine.

The major questions doctrine was initially presented as a *Chevron* deference limit. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Federal Communications Commission was not entitled to *Chevron* deference because the Commission's interpretation of the term "modify" in Section 203 of the Communications Act went "beyond the meaning that the statute [could] bear."[39] The Court then held that the FCC lacked authority under the Communications Act to adopt the proposed policy because it was "a fundamental revision of the

[33] *See, e.g.*, James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS INST. (Aug. 18, 2022) https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/ (identifying the major questions doctrine as a limit placed on *Chevron* deference).
[34] *See, e.g.*, Sunstein, *supra* note 30, at 1676–76 (explaining the major question doctrine can be understood as "a kind of 'carve out' from *Chevron* deference"); Kunhardt & O'Connell, *supra* note 33.
[35] 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting).
[36] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994).
[37] *West Virginia v. EPA*, 142 S. Ct. at 2633–34 (Kagan, J., dissenting).
[38] *Id.* at 2609 (majority opinion).
[39] 512 U.S. 218, 229 (1994).

statute."[40] Six years later, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court again withheld *Chevron* deference when the Food and Drug Administration (FDA) interpreted the Food, Drug and Cosmetic Act (FDCA) as authorizing FDA regulation of tobacco products.[41] Despite *Chevron*'s premise that "ambiguity constitutes an implicit delegation from Congress," the Court determined "[i]n extraordinary cases … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[42] Because this constituted an extraordinary case, deference was not appropriate.[43] This strand of the major questions doctrine, reflected in a few other subsequent cases,[44] is sometimes called *Chevron* step zero.[45] It operates as "a kind of 'carve out' from *Chevron* deference."[46] Because *Chevron* deference was not appropriate in these extraordinary cases, the Court would revert to traditional judicial review principles and independently resolve the question of law, without deferring to the agency's reasonable interpretations.[47]

But *Brown & Williamson Tobacco Corp.* also introduced an alternative major-questions formulation: the major questions doctrine could preclude agency action on topics of economic and political significance, unless clearly authorized by Congress. Rather than conducting a *Chevron* deference analysis, the Court determined a "common sense" consideration of "the manner in which Congress [wa]s likely to delegate a policy decision of such economic and political magnitude to an administrative agency" should guide statutory interpretations.[48] Relying on this "common

[40] *Id.* at 231–32.
[41] 529 U.S. 120, 125–26 (2000).
[42] *Id.* at 159.
[43] *Id.* at 133.
[44] *See* Gonzales v. Oregon, 546 U.S. 243, 258-59 (2006); King v. Burwell, 576 U.S. 473, 485 (2015).
[45] *See generally* KOCH, JR. & MURPHY, supra note 9, § 11:34.15.
[46] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 482 (2021); *see also Major Questions Objections*, 129 Harv. L. Rev. 2191, 2193 (2016) (note).
[47] *Id.* at 482.
[48] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

sense," courts should recognize "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[49] The Court subsequently adopted a clear statement rule for such cases in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). When an agency seeks to take action with great economic and political significance, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[50] Under this major questions strand, similarly reflected in a few other cases,[51] the issue is not merely the correct interpretation of an ambiguous statute, but whether Congress has delegated authority on the issue of economic and political significance. If Congress failed to provide a clear statement, courts should not independently resolve any statutory ambiguities because additional action from Congress is necessary.[52]

These were not the only major-questions-approaches posited. Some scholars have suggested the major questions doctrine is the nondelegation doctrine disguised as a method of statutory interpretation and the clear-statement rule effectively prohibits Congressional delegations on "major" issues.[53] Other scholars argued the major questions doctrine prevents agency self-aggrandizement.[54] The divergent opinions on the contours and purpose of the major questions doctrine shows the lack of clarity in the early cases. And, as a result, courts, agencies, and litigants lacked clear guidance on how to apply the doctrine.[55]

[49] *Id.* at 160.
[50] 573 U.S. 302, 324 (2014).
[51] *See* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. ___, 142 S. Ct. 661, 665 (2022).
[52] *See* Sunstein, *supra* note 46, at 483; *see also* Sohoni, *supra* note 2, at 264.
[53] *See* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. 174, 177 (2022); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 445 Admin. L. Rev. 445, 463 (2016).
[54] *See* Monast, *supra* note 53, at 462–63.
[55] Richardson, *supra* note 53, at 195–06; *see also* Monast, *supra* note 53, at 464–65; Sunstein, *supra* note 26, at 193.

II. THE MAJOR QUESTIONS DOCTRINE ARTICULATED IN *WEST VIRGINIA V. EPA*

West Virginia v. EPA unequivocally recognized the major questions doctrine as a canon of statutory interpretation[56] and provided an analytical framework for major-questions cases. The decision did not, however, provide a precise standard for identifying when an agency action warrants a major-questions analysis. This Part summarizes the majority opinion in *West Virginia v. EPA* and Justice Gorsuch's concurrence.

The issue presented in *West Virginia v. EPA* was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act."[57] Section 111 of the Clean Air Act ("CAA") directed the EPA to identify categories of stationary sources that significantly cause or contribute to "air pollution, which may reasonably be anticipated to endanger the public health or welfare."[58] Under Section 111(b), the EPA must then promulgate a standard of performance on a pollutant-by-pollutant basis that adequately demonstrates the "best system of emission reduction" (BESR) for *new* sources.[59] Under Section 111(d), the EPA must then address emissions of the same pollutant by *existing* sources, if they are not already regulated under another CAA program.[60]

In 2015, the EPA announced two rules addressing carbon dioxide pollution: one establishing the BSER for new coal and gas plants, and the other establishing the BSER for existing coal and gas plants.[61] The latter was challenged in *West Virginia v. EPA*. The BSER for existing sources,

[56] 597 U.S. ___, 142 S. Ct. 2587 (2022); *see also* David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. LAW BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/; *see also* Kristen E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REG – NOTICE & COMMENT (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/.
[57] 142 S. Ct. at 2615–16.
[58] *Id.* at 2601 (quoting 42 U.S.C. § 7411(b)(1)(A)).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2602.

also called the Clean Power Plan, included three building blocks: (1) practices coal plants could undertake to burn coal more efficiently; (2) generation shifting from coal to natural gas plants; and (3) generation shifting from coal and gas to wind and solar generators. The effect of the Clean Power Plan would be a "sector-wide shift in electricity production from coal to natural gas and renewable."[62] The Clean Power Plan never took effect because dozens of parties sought judicial review the same day the EPA promulgated the rule. And, after a convoluted procedural path, the Supreme Court granted certiorari.

Chief Justice Roberts, writing for the majority, held the EPA lacked authority under the Clean Air Act to adopt the Clean Power Plan as the BSER.[63] In doing so, the Court articulated the major questions standard and its justification:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to clear 'clear congressional authorization' for the power it claims.[64]

The Court first noted the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall scheme."[65] And, where the statute confers authority upon an administrative agency, an inquiry into agency action must be shaped by "whether Congress in fact meant to confer" the asserted authority.[66] A clear statement

[62] *Id.* at 2603.
[63] *Id.* at 2616.
[64] *Id.*
[65] *Id.* at 2607.
[66] *Id.* at 2608.

for agency action on major questions is then justified when the statutory scheme demonstrates an agency interpretation is "extraordinary" and "common sense as to the manner in which Congress [would have been] likely to delegate such power to the agency at issue, ma[kes] it very unlikely that Congress had done so."[67] Major questions cases are a departure from "ordinary" cases involving agency interpretations and assertions of authority.[68]

The Court therefore set out a two-step framework for judicial review of administrative agency action. First, the court must determine whether the asserted agency action presents "a major questions case."[69] If so, "the Government must … point to 'clear congressional authorization' to regulate" in the asserted manner.[70] The terms "major questions case" and "extraordinary cases" are used interchangeably in articulating step one.[71] "Extraordinary cases" are defined as "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance' of that assertion provide a reason to hesitate before concluding that Congress' meant to confer such authority."[72] The Court highlighted several factors that indicate there may be a major questions case: (1) the agency "claimed to discover in a long-extant statute an unheralded power";[73] (2) the claimed power represented a "transformative expansion in [its] regulatory authority";[74] (3) the agency relied on an ancillary, rarely used provision;[75] (4) "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency;[76] (5) the agency lacked "comparative expertise" over the policy judgments;[77] and (6) the

[67] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[68] *See id.* at 2609.
[69] *See id.* at 2610.
[70] *Id.* at 2614.
[71] *Id.* at 2609–10.
[72] *Id.* at 2608 (internal quotation marks omitted) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).
[73] *Id.* at 2610 (quoting Util. Air Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[74] *Id.* (quoting *Util. Air Grp.*, 573 U.S. at 324).
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2612.

proposed policy "has been the subject of earnest and profound debate across the country."[78] Applying these factors, the Court determined it had "a major questions case" and concluded the term "system" was not sufficient "clear congressional authorization" to regulate in the manner prescribed by the EPA Clean Power Plan.[79]

Justice Gorsuch, joined only by Justice Alito, in concurrence took a more expansive view of when a major questions case is presented. Rather than limiting the doctrine to "extraordinary cases" of agency action, Justice Gorsuch would invoke the major question doctrine, and require clear congressional authorization, for all "decisions of vast 'economic and political significance'" by administrative agencies.[80] At first this may not seem to be a significant distinction, but under Justice Gorsuch's approach, a major question case would exist when the agency resolves "a matter of great 'political significance'" *or* imposes significant economic regulations.[81] Unlike the multi-factor approach taken by the majority, Justice Gorsuch seems to suggest political *or* economic significance alone would trigger the major-questions-clear-statement rule, such that "an agency must point to clear congressional authorization."[82] This would likely encompass a broader swath of agency action. Justice Gorsuch recognizes as much by explaining the major question doctrine "took on a special importance" due to the "explosive growth of the administrative state" and seeks to prevent agencies from "churn[ing] out new laws more or less at whim."[83]

Although *West Virginia v. EPA* defined the overarching standard for major questions cases, the list of factors provided by the majority and the divergent approach advocated by Justice Gorsuch left open a significant question: What qualifies as a major-questions case?

[78] *Id.* at 2614.
[79] *Id.* at 2610, 2614.
[80] *Id.* at 2626 (Gorsuch, J., concurring).
[81] *Id.* at 2620 (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022)).
[82] *Id.*
[83] *Id.* at 2618.

III. A JUDICIALLY ADMINISTRABLE TEST FOR IDENTIFYING MAJOR QUESTIONS CASES

Step one of the newly adopted major-questions inquiry requires a court to determine whether agency action presents an "extraordinary case[]."[84] But, as Justice Kagan emphasized in dissent, how court should conduct this inquiry remains unclear: a reviewing court must somehow "decide[] by looking at some panoply of factors."[85] Scholars similarly viewed the Court's guidance on how to decipher when agency action presents a major question insufficient.[86] Despite the "mushy" standard,[87] a judicially administrable test can be identified in *West Virginia v. EPA* and supported by major-questions precedent. This Part will first identify and reject incorrect or unwieldy approaches arising in the courts of appeals. It will then argue that the approach is hiding in plain sight in *West Virginia v. EPA.*

A. Erroneous Approaches to Identifying Major Question Cases

Courts of appeals have attempted to apply the major questions test articulated in *West Virginia v. EPA*, but the approaches lack a judicially-administrable standard or reflect an incorrect understanding of the major questions doctrine.

The Fifth Circuit has adopted two conflicting and incorrect approaches to identifying major question cases post-*West Virginia v. EPA*. First, in *Midship Pipeline Company, L.L.C. v. FERC*, 45 F.4th 867 (5th Cir. 2022), the Fifth Circuit relied on *West Virginia v. EPA* to hold the Natural Gas Act did not authorize FERC to determine reasonable costs of remediation for natural gas pipelines constructed on privately held land.[88] But the court did not conduct step-one of the major questions analysis. Instead, the decision rested on the overarching principle that "[a]gencies have

[84] *Id.* at 2609–10.
[85] *Id.* at 2634 (Kagan, J., dissenting).
[86] *See* Hickman, *supra* note 56 (describing the standard articulated as "mushy .. rather than a bright line rule"); Strict Scrutiny, *Just how bad is the Supreme Court's EPA decision?* (June 30, 2022), https://crooked.com/podcast/just-how-bad-is-the-supreme-courts-epa-decision/ (describing the decision as based on "vibes" about agencies).
[87] Hickman, *supra* note 56.
[88] *Id.* at 876-77.

only those powers given to them by Congress."[89] Based on this premise, the Fifth Circuit conducted a statutory interpretation and determined the Natural Gas Act did not authorize the power asserted by FERC.[90] The court did not consider any of the factors discussed in *West Virginia v. EPA*, including whether FERC's action implicated an issue of economic or political significance This approach conflicts with *West Virginia v. EPA* and the major questions doctrine because it disregards the emphasis placed on "extraordinary cases."[91] By failing to first determine whether the asserted agency action even presented an extraordinary case, the Fifth Circuit erroneously expanded the major questions doctrine from extraordinary cases to all agency actions.

In *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022), the Fifth Circuit took a different approach by erroneously conflating the major questions doctrine and *Chevron*'s step-two.[92] There, the Fifth Circuit held DACA would fail step two of *Chevron* because DHS had unreasonably interpretated the INA.[93] The interpretation was unreasonable because DACA "implicates questions of deep economic and political significance" and there was "no 'clear congressional authorization' for the power that DHS claim[ed]."[94] While in prior cases the Court has blurred the line between the major questions doctrine and *Chevron* deference,[95] *West Virginia v. EPA* disentangled the major questions doctrine and *Chevron* analysis. In almost all prior major questions cases, the Court has used *Chevron* as the starting point for reviewing the administrative agency's statutory interpretations.[96] But *Chevron* was not cited or referenced at all by the majority opinion in *West*

[89] *Id. (*quoting *West Virginia v. EPA*, 142 S. Ct. at 2607).
[90] *Id.*
[91] *See West Virginia v. EPA*, 142 S. Ct. at 2609; *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[92] *See* 50 F.4th at 526–27.
[93] *Id.* at 526
[94] *Id.*
[95] *See supra* Part I.C.; *see, e.g.*, Util. Air Reg. Grp. v. EPA, 573 U.S. 302 314 (2014).
[96] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485 (2015). The Court departed from this approach in just two prior cases. *see* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488–89 (2021) (conducting a statutory interpretation without discussion of *Chevron*); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S.

Virginia v. EPA. And the analytical framework applied was quite distinct. Under *Chevron*, the reviewing court begins with the text to determine whether Congress has directly spoken to the issue.[97] Under the major questions doctrine, the reviewing court begins with the agency action to determine whether it presents an "extraordinary case."[98] And, unlike the deferential treatment of implied delegations in *Chevron*,[99] the major questions doctrine "skepticism" to implied delegations and requires "clear congressional authorization."[100] By collapsing the major-questions analysis and *Chevron* step-two, the Fifth Circuit failed to appropriately analyze whether DACA presented an "extraordinary case" for the purposes of major questions analysis.

In contrast, the Eleventh Circuit applied the correct framework, but struggled to find a judicially-manageable test. In *Georgia v. President of the United States*, 48 F.4th 1283 (11th Cir. 2022), the Eleventh Circuit held the Procurement Act did not authorize agencies to insert a COVID-19 requirement into all procurement contracts and solicitations.[101] The court did not establish a clear test or relevant factors for identifying a major question but seemed to implicitly base its reasoning on three factors identified in *West Virginia v. EPA*. First, the agency claimed to discover an unheralded power to impose an "all-encompassing vaccine requirement" in the Procurement Act's "project specific restrictions."[102] Second, the claimed power represented a transformative expansion in the agency's power because the "general authority … to insert a term in every solicitation and every contract" was "worlds away" from "the sort of project-specific

____, 142 S. Ct. 661, 665–66 (2022) (same). Both of these decisions arose from the Court's emergency docket, also known as the shadow docket. As a result, the per curiam opinions lacked a comprehensive explanation of the Court's analytical approach. *See* Steve Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787, 1788 (2022); Cashmere Cozart, *SCOTUS' Shadow Docket Coming Out of the Shadows*, UNIV. OF ILL. CHI. L. REV. (Sept. 12. 2021), https://lawreview.law.uic.edu/news-stories/scotus-shadow-docket-coming-out-of-the-shadows/.

[97] Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[98] *West Virginia v. EPA*, 142 S. Ct. at 2608.

[99] See *Chevron*, 467 U.S. at 843.

[100] *West Virginia v. EPA*, 142 S. Ct. at 2614.

[101] 48 F.4th at 1296.

[102] *See id.* at 1296.

restrictions contemplated by the [Procurement] Act."[103] And, lastly, Congress had declined to enact legislation conferring this broad authority based on other statutes that impose "a particular economic or social policy among federal contractors through the procurement process," and the absence of a statutory provision imposing an "across-the-board vaccination mandate."[104] While this Eleventh Circuit analyzed the factors identified in *West Virginia v. EPA*, the approach lacks sufficient structure for consistent judicial administration. It is vulnerable to the criticism that courts will simply choose from some unclear "panoply of factors"[105] or make decisions based on "vibes."[106] Thankfully, *West Virginia v. EPA* and prior cases reveal a judicially-manageable test for identifying major questions cases.

B. Identifying Major Questions Cases Using West Virginia v. EPA*'s Dual-Element Test*

i. The dual-element test

In defining "extraordinary cases," *West Virginia v. EPA* impliedly identified a two-element test to determine when a major questions case is presented. The Court defined extraordinary cases based on the "history and the breadth of the authority that [the agency] has asserted, *and* the economic and political significance of that assertion.'"[107] This definition suggests major-questions cases satisfy two distinct elements: (1) the asserted authority is novel and extensive based on the "history and breadth of the authority that the agency has asserted" *and* (2) the asserted authority implicates issues of "economic and political significance."[108] The factors identified by the majority and prior major questions doctrine cases reveal how each element can be satisfied.

---

[103] *See id.*
[104] *See id.* at 1297.
[105] *See West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting).
[106] *See* Strict Scrutiny, *supra* note 86.
[107] *West Virginia v. EPA*, 142 S. Ct. at 2608 (emphasis added) (internal quotation marks omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[108] *Id.*

Four factors identified in *West Virginia v. EPA* address whether an agency's action is novel and extensive in light of the history and breadth of the agency's authority: (1) the discovery of an unheralded power in a long-extant statute; (2) the power is a transformative expansion in the agency's regulatory authority; (3) the power is found in an ancillary provision; and (4) the agency lacks comparative expertise over the asserted power. Prior major-questions cases confirm that these factors are evidence of novel or extensive agency action.

An agency's discovery of an unheralded power in a long-extant statute demonstrates novelty because it is a departure from the agency's prior "established practice" and shows a historic "want of assertion of power."[109] In *West Virginia v. EPA*, the EPA "had never devised a cap by looking to a [generation-shifting] system," which indicated the current assertion of authority was a newfound power.[110] Framed differently: the absence of precedent for the asserted authority indicates it is novel.[111] For instance, in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ___, 141 S. Ct. 2485 (2021), the agency's claim of authority was "unprecedented" because no prior regulation under the provision, which was enacted in 1944, approached a similar "size or scope."[112]

A "transformative expansion in [the agency's] regulatory authority"[113] reflects both novelty and an extensive increase in authority. This factor can be shown by a "fundamental revision of the statute" [114] to enable regulation in a new area or industry.[115] The first major questions case, *MCI Telecommunications Corp.*, explains a "fundamental change" "depends to some extent on the

[109] *See id.* at 2610 (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).
[110] *Id.*
[111] *See id.* at 2610; *see also* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021); Nat'l Fed. of Indep. Bus. v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 666 (2022).
[112] 141 S.Ct. at 2489.
[113] *West Virginia v. EPA*, 142 S. Ct. at 2610.
[114] *Id.* at 2611 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).
[115] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000).

importance of the item changed to the whole."[116] When an agency action revises a provision with "enormous importance" to the statutory scheme or "'central' to administration" of the statute, it introduces a "new regime of regulation" that "is not the one that Congress established."[117] By changing the regulatory regime, the agency is asserting regulatory authority over a new area or sector.[118] In *West Virginia v. EPA*, this "fundamental revision" was evidenced by transitioning from regulating the performance of individual sources to regulating the emissions of a sector as a whole.[119]

When the newfound power is located in an "ancillary" or rarely-used provision of the Act,[120] it supports a finding of novelty. The provision relied on by the EPA in *West Virginia v. EPA* was characterized as the "backwater" of the Section because it had been used "only a handful of times" and was "designed to function as a gap filler."[121] In the past, the Court has also found ancillary provisions to contain "express limitation[s]" or address other agency's roles in the regulatory scheme.[122] For instance, in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), a provision authorizing the Attorney General to deny, suspend, or revoke physician's registrations was an express limitation that did not authorize medical judgments because those judgments were delegated to the Secretary of Health and Human Services.[123] Relying on an ancillary provision suggests the action is novel or broad because it introduces a new basis for action and may encroach on another agency.

---

[116] *MCI Telecomms. Corp.*, 512 U.S. at 229.
[117] *Id.* at 234.
[118] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 146 (tobacco); Gonzalez v. Oregon, 546 U.S. 243, 261 (2006) (criminalization of medical professionals); Nat'l Federation of Indep. Business v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 665 (2022) (hazards of daily life); Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488 (2021) (downstream connections to the spread of disease).
[119] *Id.*
[120] *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001)).
[121] *Id.* at 2602, 2610, 2613.
[122] *See Gonzalez*, 546 U.S. at 266–67.
[123] *Id.*

When the agency lacks "comparative expertise" over the asserted policy judgments,[124] the proposed action may be novel and extensive. Generally, "Congress intend[s] to invest interpretive power in the administrative actor in the best position" to exercise such judgment.[125] Where the agency lacks expertise or experience, they are impliedly acting outside their area of knowledge and diverging from their historical practices. In *West Virginia v. EPA*, EPA lacked the necessary "technical and policy expertise" "in areas such as electricity transmission, distribution, and storage."[126] The Court has also relied on an absence of expertise in prior major-questions cases when the Attorney General sought to make medical judgments[127] and the IRS sought to craft health care policy.[128]

West Virginia v. EPA and major-questions precedent also explain how the second element, economic and political significance, can be satisfied. Although the conjunction "and" suggests both economic and political significance is necessary, past cases point to the opposite conclusion.[129] Either economic or political significance is sufficient to satisfy the second element. First, an agency action presents issues of economic significance when it regulates a significant portion of a major American industry;[130] requires billions of dollars in private spending or administrative costs;[131] and/or affects the economic decisions of millions of Americans.[132] In *West*

[124] *West Virginia v. EPA*, 142 S. Ct. at 2613.
[125] *See Gonzalez*, 546 U.S. at 266.
[126] *West Virginia v. EPA*, 142 S. Ct. at 2612.
[127] *Gonzalez*, 546 U.S. at 267.
[128] King v. Burwell, 576 U.S. 473, 486 (2015).
[129] *See, e.g.*, *Gonzalez*, 546 U.S. at 267–68 (addressing only political significance); *Util. Air Reg. Grp.*, 573 U.S. at 322–24 (addressing only economic significance).
[130] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) (agency action would effect 40% of a major sector of the telecommunications industry); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (regulation would apply to an industry constating a significant portion of the American economy); *Util. Air Reg. Grp.*, 573 U.S. at 324.
[131] *See Util. Air Reg. Grp.*, 573 U.S. at 324 (regulations would impose $21 billion in administrative costs and $147 billion in permitting costs); *see also King*, 576 U.S. at 485; Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021).
[132] *See King*, 576 U.S. at 485.

Virginia v. EPA, the Clean Power Plan had economic significance because it would assert "unprecedented power of American industry" and would "entail billions of dollars in compliance costs," which would then affect energy prices for Americans.[133] And, in *King v. Burwell*, 576 U.S. 473 (2015), a regulation that would affect the price of health insurance for millions of people had sufficient economic significance.[134]

Second, political significance can be shown by Congressional action or inaction regarding the specific program, prominent debate surrounding the issue, and/or tension with state law or authority. First, *West Virginia v. EPA*, and past decisions, have placed significant emphasis on whether "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency[135] because the presence of debate or contrary legislation in Congress indicates the "importance of the issue."[136] Second, the issue is politically significant when it has been the "subject of earnest and profound debate across the country"[137] because "political and moral debate" surrounding an issue demonstrates its importance to the public.[138] Third, political significance is shown when the agency action intrudes on a particular domain of state law.[139] In *Alabama Association of Realtors*, the Court identified intrusion on a "particular domain of state law" as a significant non-financial issue because it would "alter the balance between federal and state power."[140]

[133] *West Virginia v. EPA*, 142 S. Ct. at 2604, 2612.
[134] 576 U.S. at 485.
[135] *West Virginia v. EPA*, 142 S. Ct. at 2610; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; *Gonzalez*, 546 U.S. at 267–68; *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2486–87.
[136] *See West Virginia v. EPA*, 142 S. Ct. at 2614.
[137] *Id.*; *see also Gonzalez*, 546 U.S. at 267–68.
[138] *Gonzalez*, 546 U.S. at 249, 267.
[139] *Ala. Ass'n. of Realtors,* 141 S. Ct. at 2489.
[140] *Id.*

ii. The legal and logical case for the dual-element test

The test requires a sufficient demonstration that the agency action (1) is novel and extensive based on the history and breadth of authority *and* (2) implicates issues of economic and political significance. Requiring a major-questions case to satisfy both elements aligns with precedent; serves the "common sense" justification of the major questions doctrine; and provides an objective approach which enables consistent judicial administration.

Although the test was not formulated until West Virginia v. EPA, every prior major-questions case has satisfied both elements. For the past thirty-years, the Court has only conducted major-questions analysis when the cases involves both a novel or extensive agency action *and* political or economic significance.[141] Although the exact phrasing of the elements and supporting factors varies, the common threads are clear. And, in formulating each factor, *West Virginia v. EPA* heavily relied on and interpreted the prior cases.[142] This also undermines the approach advocated by Justice Gorsuch. In no case is political *or* economic significance *alone* sufficient to render the case "extraordinary."[143]

The dual-element test ensures the major questions doctrine is only applied in "extraordinary cases" where common sense warrants skepticism of whether Congress delegated authority. An indeterminate and unclear standard could encompass ordinary cases of agency action. If the major

[141] *See, e.g., MCI Telecomms. Corp.*, 512 U.S. 218, 231 (1994) (explaining agency action constituted "fundamental revision" and affected 40% of a major sector of the industry); *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146, 159–60 (2000) (explaining agency action constituted an expansion into the tobacco industry, discovered a new power in a statute, regulated an industry constituting a significant portion of American economy, and Congress had declined to enact such a scheme); *Gonzalez*, 546 U.S. 243, 249, 260–61, 266–67 (2006) (explaining agency action constituted a transformation of the limits placed on the Attorney General to allow regulation in a new area, was outside the expertise of the Attorney General, relied on an ancillary provision, had been the subject of earnest and profound debate, and intruded on state law); *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2488 (explaining agency action constituted a transformative expansion in authority, asserted a unprecedented power, had significant economic impact, and intruded on state law).
[142] *See West Virginia v. EPA*, 142 S. Ct. at 2608–2614.
[143] *See id.* at 2618–26 (Gorsuch, J., concurring).

doctrine required "clear congressional authorization" for mundane and traditional exercises of administrative agency power, it could interfere with the separation of powers by restricting Congress' ability to legislative freely, including authorizing administrative agencies to fill in the gaps of legislation. But a novel or broad assertion of authority is coupled with an issue of significant political or economic importance creates skepticism because it prevents executive branch aggrandizement absent clear congressional authorization. By limiting the major questions doctrine to "extraordinary cases," administrative agencies are cabined within their legislative authority, but courts are not overreaching.

Judicial administration is also bolstered by the test because it relies on objective factors and introduces a clear threshold requirement. A major questions case cannot be demonstrated by a mere showing of some indeterminate degree of political or economic significance. Rather, the agency action must reflect a departure from ordinary agency practice under the first element. And the political and economic implications are not theoretical "vibes," but grounded in an objective showing of political debate, conflicts with state law, or extensive private or public costs.

This test has already been applied, admittedly without extensive analysis or reasoning, in the D.C. Circuit. *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), held a rule requiring New England fisheries to fund at-sea monitoring programs promulgated by the National Marine Fisheries Service pursuant to its authority to establish "fishery management plans" under the Magnuson-Stevens Fishery Conservation and Management Act did not constitute a major questions case.[144] Judge Rogers, joined by Chief Judge Srinivasan, determined the major

[144] 45 F.4th 359, 363–64 (D.C. Cir. 2022). After this paper was drafted, the Supreme Court granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to address "whether the court should overrule *Chevron*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See* Loper Bright Enters. v, Raimondo, No. 22-451 (cert. granted May 1, 2023).

questions doctrine "applies *only*" when the "history and breadth of the authority that [the agency] has asserted *and* the economic and political significance of the assertion" demonstrate an "extraordinary case[]."[145] The monitoring program failed to meet this standard because the National Marine Fisheries Service had "expertise and experience within [the] specific industry" and the agency did not claim "broader power to regulate the national economy."[146] Also, while the Eleventh Circuit did not rely on the two-element framework in *Georgia v. President of the United States*, the court's decision did rely on a showing of both novel or extensive action *and* issues of political or economic significance.[147] These early cases forecast judicial administration may be possible based on the dual-element requirement and objective factors derived from *West Virginia v. EPA*.

CONCLUSION

Admittedly, one aspect of this test remains unclear. Due to varying approaches across cases, it is unclear how many factors are necessary to demonstrate each element. For instance, could a lack of expertise alone demonstrate an agency action was novel and extensive? While in almost all cases multiple factors demonstrated a departure from ordinary agency action, in *King v. Burwell*, the IRS' lack of expertise in health care policy alone seemed sufficient.[148] This question will need to be answered, but the dual-element test set out in *West Virginia v. EPA* creates the beginnings of a judicially administrable standard for identifying major questions cases.

[145] *Id.* at 364 (emphasis added) (internal quotation marks omitted) (quoting *West Virginia*, 142 S. Ct. at 2595).
[146] *Id.*
[147] Georgia v. President of the United States, 48 F.4th 1283, 1296 (11th Cir. 2022).
[148] King v. Burwell, 576 U.S. 473, 485 (2015)

Applicant Details

First Name	**Michael**
Middle Initial	**F**
Last Name	**Cronin**
Citizenship Status	**U. S. Citizen**
Email Address	**mcronin2295@gmail.com**
Address	**Address** Street **405 S Main Street, Apt 211** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**2039402059**

Applicant Education

BA/BS From	**University of Richmond**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 5, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Technology Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Oral Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Santacroce, David
dasanta@umich.edu
734-763-4319
McQuade, Barbara
bmcquade@umich.edu
734-763-3813
Moran, David
morand@umich.edu
734-615-5419

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a May 2023 graduate of the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

Prior to law school I worked in Washington D.C. for two years first interning for a member of Congress, and then working at a political research firm. That experience helped me sharpen my research and writing skills and develop a strong attention to detail and ability to adhere to tight deadlines. I carried those skills over to law school where I excelled academically, volunteered at the Michigan Innocence Clinic and the Civil Criminal Litigation Clinic, and served as a Senior Judge – a legal research and writing assistant for the legal practice professor. I also oversaw the selection and editing of scholarly articles as the Managing Articles Editor for the Michigan Technology Law Review. During the summer after my first year of law school I had the privilege of interning at the US Attorney's Office for the Eastern District of Michigan, which sparked my interest in becoming and AUSA in the future. Last summer I worked at Cleary Gottlieb Steen & Hamilton as a summer associate in their New York office where I plan to return in the fall. My experience in law school, and especially with the Michigan Innocence Clinic and the Civil Criminal Litigation Clinic, where I had had the opportunity to prepare briefs, file motions to appeal, argue in court and serve as counsel in a bench trial has convinced me that clerking would provide me with invaluable training for my future career as a litigator and allow me to engage in public service, which I intend to make an essential part of my future career.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

• Professor Barbara McQuade: bmcquade@umich.edu
• Professor David Moran: morand@umich.edu
• Professor David Santacroce: dasanta@umich.edu

Thank you for your time and consideration.

Respectfully,

Michael Cronin

Michael Cronin

405 S. Main St., Apt 211, Ann Arbor, MI 48104
203-940-2059 • mfcronin@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL (3.693 GPA: Historically top 25%) Ann Arbor, MI

Juris Doctor May 2023
Honors: Dean's Scholarship
Activities: *Managing Articles Editor - Michigan Technology Law Review* Fall/Winter 2021-2023
Treasurer – Criminal Law Society
Volunteer at Civil Rights Litigation Clearinghouse, Oral Advocacy Competition

UNIVERSITY OF RICHMOND Richmond, VA
Bachelor of Arts in Politics, Philosophy, Economics and Law May 2018
Minor: Journalism
Activities: Intern at Richmond General Assembly
Sports Editor of *The Collegian* – University of Richmond Student Newspaper, Volunteer at Huntsman Cancer Foundation

EXPERIENCE

CIVIL CRIMINAL LITIGATION CLINIC (UNIVERSITY OF MICHIGAN LAW SCHOOL) Ann Arbor, MI
Student Attorney January 2023 – May 2023

- Represented clients in eviction proceedings before Michigan circuit court in Washtenaw County
- First chaired a bench trial in a suit for nonpayment of rent, secured dismissal in the case

CLEARY GOTTLIEB STEEN & HAMILTON (OFFER EXTENDED PLAN TO RETURN) New York, NY
Summer Associate May 2022– July 2022

- Performed research and wrote memoranda in support of litigation and enforcement matters
- Supported attorneys and attended meetings between Cleary attorneys and government attorneys and clients

MICHIGAN INNOCENCE CLINIC (UNIVERSITY OF MICHIGAN LAW SCHOOL) Detroit, MI
Student Attorney August 2021– May 2022

- Conducted research and investigated innocence claims from people convicted of felonies in Michigan
- Prepared briefs, memoranda and motions in support of litigation for Innocence Clinic clients and investigation subjects

UNIVERSITY OF MICHIGAN LAW SCHOOL - LEGAL WRITING AND RESEARCH SEMINAR Ann Arbor, MI
Senior Judge August 2021– May 2022

- Helped prepare entering 1L students at Michigan Law for their writing and research assignments and supported their transition into law school
- Graded and gave feedback on student assignments including memos, citation assignments and oral arguments

UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF MICHIGAN Detroit, MI
Law Student Volunteer June 2021 – July 2021

- Drafted memos and conducted research on legal policy for AUSAs in support of criminal and civil cases

- Attended and monitored court proceedings and shadowed AUSAs in day-to-day activities

LAKE RESEARCH PARTNERS Washington, D.C.
Research Fellow August 2019 – May 2020

- Conducted political research & analysis of candidates for office, including the Biden presidential campaign
- Crafted presentations, compiled and interpreted research data, & recorded team and client meetings
- Organized and facilitated surveys and focus groups with field director

SKILLS & INTERESTS

Interests: Basketball, tennis, golf, reading, chess, podcasts, e-books, running, bike rides, fantasy football

Control No: E196812901 Issue Date: 06/02/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	530	003	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	540	001	Introduction to Constitutional Law	Samuel Bagenstos	4.00	4.00	4.00	B+
LAW	580	002	Torts	Don Herzog	4.00	4.00	4.00	B+
LAW	593	015	Legal Practice Skills I	Mark Osbeck he-him-his	2.00		2.00	H
LAW	598	015	Legal Pract:Writing & Analysis	Mark Osbeck he-him-his	1.00		1.00	H
Term Total				**GPA: 3.533**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.533**		**12.00**	**15.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	510	001	Civil Procedure	Daniel Hurley	4.00	4.00	4.00	A
LAW	520	001	Contracts	Daniel Crane	4.00	4.00	4.00	A-
LAW	594	015	Legal Practice Skills II	Mark Osbeck he-him-his	2.00		2.00	H
LAW	751	001	Accounting for Lawyers	James Desimpelare	3.00	3.00	3.00	A
Term Total				**GPA: 3.890**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.704**		**23.00**	**28.00**	

Continued next page >

Control No: E196812901 Issue Date: 06/02/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	B+
LAW	741	004	Interdisc Prob Solv Identity Theft: Causes and Countermeasures	Barbara Mcquade Bridgette Carr Florian Schaub	3.00	3.00	3.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	976	001	Michigan Innocence Clinic	David Moran Imran Syed Megan Richardson	4.00	4.00	4.00	A-
LAW	977	001	Michigan Innocence Clinic Sem	David Moran Imran Syed Megan Richardson	3.00	3.00	3.00	A-
Term Total				**GPA: 3.650**	**16.00**	**14.00**	**16.00**	
Cumulative Total				**GPA: 3.683**		**37.00**	**44.00**	

Continued next page >

Control No: E196812901 Issue Date: 06/02/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	731	001	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	976	001	Michigan Innocence Clinic	David Moran Imran Syed Megan Richardson	4.00	4.00	4.00	A-
LAW	977	001	Michigan Innocence Clinic Sem	David Moran Imran Syed Megan Richardson	3.00	3.00	3.00	A-
Term Total				**GPA: 3.700**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.687**		**49.00**	**58.00**	
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	429	001	Federal Prosecution & Defense	Leonid Feller	2.00	2.00	2.00	B+
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	793	001	Voting Rights / Election Law	Ellen Katz	4.00	4.00	4.00	A-
LAW	980	366	Advanced Clinical Law	Imran Syed	3.00	3.00	3.00	A
Term Total				**GPA: 3.608**	**12.00**	**12.00**	**12.00**	
Cumulative Total				**GPA: 3.672**		**61.00**	**70.00**	

Continued next page >

Control No: E196812901 Issue Date: 06/02/2023 Page 4

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	428	001	Evidence Practicum	Daniel Hurley	2.00	2.00	2.00	A-
LAW	786	801	History of International Law	Alonso Gurmendi Dunkelberg	2.00	2.00	2.00	A-
LAW	809	001	Cross-Border Mergers & Acquis	Alicia Davis	2.00	2.00	2.00	A-
LAW	920	001	Civil-Criminal Litigation Clnc	David Santacroce Victoria Clark	4.00	4.00	4.00	A
LAW	921	001	Civil-Criminal Litig Clnc Sem	David Santacroce Victoria Clark	3.00	3.00	3.00	A-
Term Total				**GPA: 3.792**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.693**		**74.00**	**83.00**	

End of Transcript
Total Number of Pages 4

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

June 16, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Michael Cronin

Dear Judge Matsumoto:

I enthusiastically write to recommend Michael Cronin for a clerkship with the Court. Michael is one of the most naturally talented, responsible and diligent students I have ever taught. He will make an excellent clerk.

Michael was my student in the in the Civil-Criminal Litigation Clinic here at the University of Michigan Law School in the Winter of 2023. During that time, Michael practiced law under my supervision as a "first chair" attorney. He worked on a variety of cases, some simple, some complex. Enrollment in the Clinic also involved 4 hours of class each week thus giving me a great opportunity to observe him at work in a variety of contexts. In both class and practice, Michael was spectacular.

Michael came to the clinic with political research and writing experience gained during his gap year and a year-long stint as a second year law student in our Innocence Clinic. It immediately showed. Near the end of the first week of class he was given a case set for trial in just two weeks. I don't believe he had ever appeared in court and know that he had never done trial level litigation. In that short time, under my supervision, he prepared all the necessary trial elements: open, close, crosses, directs, and a large stack of exhibits. His work was extremely impressive. His research was exemplary. His writing sharp, crisp, to the point and far ahead of his peers. And his insight into what mattered and what didn't rivaled attorneys who have been practicing for years. Finally, at trial, he worked impressively and at an extremely advanced level. He spoke eloquently, asked all the right questions, and never flustered in the face of a handful of unexpected twists and turns. Perhaps most importantly, he reflected on his work and took serious the lessons that his successes and mistakes brought. In my eyes, these abilities put him ahead of most of his peers.

Michael stands apart in other ways. He is mature beyond his years and driven to succeed without the aggressiveness we often see in young lawyers. He is also extremely well balanced and spoken. He worked with his classmates and clinic staff in timely, empathetic and collaborative way. All of these traits made him a true pleasure to work with, an opinion shared by his fellow students and clinic staff alike. I firmly believe that, if given the chance, he will make an excellent clerk.

If you need more or different information, please feel free to call or e-mail me.

Sincerely yours,

David A. Santacroce, Esq.
Clinical Professor of Law
Director, Civil/Criminal Litigation Clinic
University of Michigan Law School
dasanta@umich.edu

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

Barbara L. McQuade
Professor from Practice

June 13, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Michael Cronin for a clerkship in your chambers. A recent graduate of Michigan Law School, Mike has been one of my best students, and I am enthusiastic in my recommendation. Mike is interested in clerking because he has great appreciation for the important role of our courts, and he wants to provide valuable public service. He also hopes to hone his already strong research, writing, and advocacy skills and to gain a deeper understanding of substantive and procedural law as he prepares for a career that he hopes will eventually lead to public service as an assistant U.S. attorney.

I first got to know Mike when he was as a student in my first year Criminal Law class. In that class of approximately 80 students, Mike stood out as someone who was always prepared to participate in discussions about legal doctrine and policy in an insightful way. I later had the pleasure of having Mike in my Advanced Criminal Procedure course and a small class on identity theft. In that smaller environment, I was able to closely observe Mike's impressive problem-solving and research skills, traits that will serve him well in a clerkship. I was also able to appreciate Mike's excellent inter-personal skills. He is a supportive classmate who was fully engaged in our class discussions. During law school, Mike also worked in two of law school's clinics, gaining important insights for someone who aspires to someday be a federal prosecutor. In addition, Mike served as the managing articles editor for a law school journal, where he further developed his writing skills, already strong from his undergraduate studies in journalism and work on his college newspaper. Mike also served as a senior judge in our legal practice program, a highly selective position for students with excellent writing skills who help teach first-year legal writing.

Mike brings with him a maturity from lived experience, having worked before coming to law school. Mike served first as a congressional intern and later as a research fellow, roles that required him to conduct research, solve problems, and work with people. These experiences have no doubt contributed Mike's strong analytical skills and good judgment. In the fall, Mike plans to join the New York office of Cleary Gottlieb, having worked there last summer. During his first law school summer, Mike worked at the U.S. Attorney's Office for the Eastern District of Michigan, where I spent 20 years of my career. These practice opportunities have helped Mike develop skills that will be useful as a law clerk.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Mike has the kinds of qualities that I would look for in a new hire – a strong intellect, an ability to work with others respectfully, and effective communication skills. Mike possesses all of these qualities in abundance, which will make him a valuable resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will add value, respect confidences, and perform every task with enthusiasm and excellence. I think Mike is very well suited to succeed in this environment. He will be an able assistant to any judge who hires him as a clerk. He has the intellectual capacity to tackle and solve challenging legal problems, he can express his ideas effectively in writing, and he will be a delightful colleague.

For all of these reasons, I enthusiastically recommend Michael Cronin for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade
734.763-3813
bmcquade@umich.edu

June 13, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Michael Cronin for a position as a judicial clerk in your chambers. I have come to know Mike very well as he was one of 24 student attorneys for 2021-22 in the yearlong Michigan Innocence Clinic, which I direct and teach, at the University of Michigan Law School. Because he did very well, he was invited back to be a student-attorney again (as an "Advanced Clinical Law" student) for the Fall 2022 term.

Mike's overall academic performance was solid throughout law school as he graduated with a 3.69 grade point average. He was also an editor of one of the journals here at Michigan, he helped teach legal writing to first-year students, and he was active in several student organizations.

As I mentioned above, I got to know Mike primarily through his work in the Michigan Innocence Clinic. While all of his work was very good, I will mention a few examples. First, he spent a great deal of time preparing to deliver an oral argument to a trial judge on a motion for DNA testing. The argument was very contentious, but Mike held his ground against the prosecutor (and the very skeptical judge) very well. In another case that we were about to give up on, Mike managed to convince several witnesses to speak to him, thus breathing new life into the case.

Mike's work on the many other cases we assigned him was equally strong. In the course of working on these cases, he demonstrated that he is able to quickly grasp complex legal issues of all sorts. In addition, Mike drafted many memos for me. I found his writing to be clear and his analytical skills to be excellent.

Having spent many hours working with Mike on various cases, I considered him to be more of a colleague than a student. I should add that he is a very friendly person without a trace or arrogance or pretension.

In short, I believe Mike will make an outstanding law clerk for any judge fortunate enough to hire him. Please feel free to contact me if you would like to discuss his qualifications further, as I would be happy to do so.

Sincerely,

David A. Moran

David Moran - morand@umich.edu - 734-615-5419

Michael Cronin
405 S. Main St., Apt 211, Ann Arbor, MI 48104
203-940-2059 • mfcronin@umich.edu

Writing Sample

I prepared this leave to appeal for the Michigan Court of Appeals after we filed a motion to have DNA testing performed on evidence for a client, which the judge denied. I have permission to use this as a writing sample. This draft is self-edited. I have removed portions that are not my work.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Trial Court No. A-96-000245-FC

Court of Appeals No.: _____

v

MARK ALLEN PORTERr,

Defendant-Appellant.

DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

University of Michigan Law School

Michigan Innocence Clinic

David A. Moran (P45353)

Imran J. Syed (P75415)

Megan B. Richardson (P85230)

Michael Cronin (Student Attorney)

Attorneys for Defendant

701 S. State Street

Ann Arbor, MI 48109

(734) 763-9353

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Application for Leave to Appeal pursuant to MCL 770.16(10). *See also* MCR 7.203(B)(4). This Application is filed less than 21 days after the trial court's judgment on March 23, 2022 and is thus timely under MCR 7.205(A)(1)(a).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Mark Porter seeks leave to appeal from the March 23, 2022, Order of the St. Clair County Circuit Court denying his motion for inspection and testing of physical evidence under MCL 770.16. Trial Court Order, Appendix A.

As discussed in greater detail below, Mr. Porter satisfies the statutory requirements under MCL 770.16 and has a due process right to the inspection and retesting of DNA evidence that might prove

his innocence. Therefore, the court below abused its discretion in denying Mr. Porter's motion and Mr. Porter respectfully asks this court to:

(1) Grant this application for Leave to Appeal;

(2) Vacate the trial court order denying his motion for inspection and retesting of physical evidence and remand the case for rehearing under the proper standard; or

(3) Summarily reverse the trial court's order and grant his underlying motion.

STATEMENT OFf QUESTIONS INVOLVED

1. **Did The Trial Court Err In Denying Mr. Porter's Motion Under MCL 770.16 For Inspection And Testing Physical Evidence Where Mr. Porter Satisfies All The Requirements Of MCL 770.16 With Respect To The Duct Tape Recovered From The Crime Scene?**

   The Defendant-Appellant Answers, "Yes."

   The Trial Court Answered, "No."

2. **Did The Trial Court Err Where—Upon finding That MCL 770.16 Does Not Entitle Mr. Porter To Having the Duct Tape Inspected And Tested—The Court Found That Mr. Porter Does Not Have A Fourteenth Amendment Due Process Right Under *District Attorney's Office v Osborne* To Such Inspection And Testing, Given That The Duct Tape Could Prove His Innocence?**

   The Defendant-Appellant Answers, "Yes."

   The Trial Court Answered, "No."

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Statement of Facts

On September 28, 1995, George and Dorothy Wendel were found dead in their home by their housekeeper. TT 2/12/1997 at 333. The Wendels were found in different rooms, both bound with duct tape. TT 2/12/1997 at 479–80. Dorothy Wendel was severely beaten and bled heavily during the attack, though the cause of her death was found to be asphyxiation. TT 2/12/1997 at 723. George Wendel was found bound as well, though he was otherwise physically unharmed. His cause of death was also asphyxiation. TT 2/12/1997 at 720.

Despite the violent nature of the crime and the apparent struggle, no physical evidence collected at the scene was matched to anyone other than the Wendels. TT 2/12/1997 at 951.

Mark Porter was convicted of two counts of felony-murder by a jury before Judge Adair in February 1997. With no forensic evidence connecting Mr. Porter to the crime, the prosecution built its case on the testimony of Mr. Porter's sister (who tipped off the police that her brother might be involved), as well as the fact that Mr. Porter was arrested with two rings belonging to the Wendels. Court of Appeals Opinion, 3/16/99, at 2 (attached as Appendix C).

Photographs from the crime scene show the duct tape used to bind Dorothy Wendel is saturated with blood. Crime Scene Photographs (Appendix F). The police also recovered at least one human hair from the surface of the duct tape that was not consistent with the known head hair from either George or Dorothy Wendel. Marysville Police Depart Report, 73 (Appendix G). The Marysville Police unsuccessfully attempted to recover fingerprints from the duct tape used to bind the Wendels, (Property Tag Nos. L-19, L-20, L-21, L-22, L-23), but they were unable to lift any usable prints. TT 2/20/1997 at 1049. No DNA analysis was conducted on the duct tape, nor was the tape retested for fingerprints in 2020 (when usable prints collected in 1995 were entered into CODIS). Department of State Police

Laboratory Report (Appendix D). Given the tape's sticky nature, the duct tape samples are good candidates for modern touch-DNA testing. Affidavit of Dr. Greg Hampikian, ¶ 39 (Appendix B).

Procedural Background

In 1999, Mr. Porter appealed his convictions as of right to this Court, which affirmed his convictions. Court of Appeals Opinion (Appendix C). In 2002, Mr. Porter filed an unsuccessful motion for relief from judgment, on grounds unrelated to DNA testing.

In January 2022, the Michigan Innocence Clinic confirmed that the Marysville Police Department has the duct tape samples in its possession. Marysville Police Department FOIA Response (Appendix E). At the request of the Clinic, DNA expert Dr. Greg Hampikian, a Professor of Biology and Criminal Justice at Boise State University and the Director of the Idaho Innocence Project, provided an evaluation of the duct tape as testable evidence. He found that there is a significant chance that DNA may be recoverable from the duct tape. Affidavit of Dr. Greg Hampikian, ¶s 39-41 (Appendix A).

In February 2022, the Michigan Innocence Clinic filed a motion pursuant to MCL 770.16 for the inspection and testing of the duct tape for touch DNA. The Michigan Innocence Clinic argued this motion in front of Judge West in the St. Clair County Circuit Court in March 2022.

Judge West denied the motion, finding that Mr. Porter did not meet the statutory requirements of MCL 770.16. Specifically, Judge West found that the blood on the duct tape does not constitute "biological material" under MCL 770.16(1) and (4)(b)(ii). Judge West, after admitting that he "[does not] have a great deal of experience with the statute," said that his understanding of MCL 770.16 was that the defendant has to "establish prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity." MT 3/21/22 at 13. Judge West further clarified that "the evidence that is now sought to be . . . tested has to be biological evidence that would lead to the resolution